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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1929~~ 1930

No. ~~530~~ 21

THE UNITED STATES OF AMERICA, PETITIONER

vs.

THE EQUITABLE TRUST COMPANY OF NEW YORK, MURRAY, ALDRICH & ROBERTS, EDWARD J. PATTERSON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 13, 1929
CERTIORARI GRANTED JANUARY 20, 1930

SUPREME COURT OF THE UNITED STATES

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1 In United States Circuit Court of Appeals for the Second Circuit

JACKSON BARNETT, A MENTAL INCOMPETENT, BY ELMER S. Bailey, his prochein ami, plaintiff
against
THE EQUITABLE TRUST COMPANY OF NEW YORK AND THE American Baptist Home Mission Society, defendants

UNITED STATES OF AMERICA, APPELLANT

THE EQUITABLE TRUST COMPANY OF NEW YORK; MURRAY, Aldrich & Roberts; Edward J. Patterson, J. Frederick Eagle, William Greenough, Sherman Day, Carroll G. Walter, and Dodge L. Marks, composing the firm of Patterson, Eagle, Greenough & Day; Rayburn L. Foster, and R. B. F. Hummer, composing the firm of Hummer & Foster; Almond D. Cochran, surviving partner of the firm of Cochran & Ellison; C. B. McCrory and Dudley C. Monk, composing the firm of McCrory & Monk; and Elmer S. Bailey, individually and as prochein ami of Jackson Barnett, appellees } E-31/91

Statement under rule 13, subdivision 4

This suit was commenced on January 22, 1925, by the filing of the original bill of complaint.

The names of the original partners were: Jackson Barnett,
2 a mental incompetent, by Elmer S. Bailey, his prochein ami, plaintiff, and the Equitable Trust Company of New York, and the American Baptist Home Mission Society, defendants.

United States of America became a party before this appeal was taken by the filing of a petition of intervention pursuant to leave of court.

There has been no other change of parties except that the law firm of Murray, Aldrich & Roberts, solicitors for defendant The Equitable Trust Company of New York, made a motion for an allowance, which motion was denied by the decree here appealed from.

An amended bill of complaint was filed on May 7, 1925.

The answer of both defendants thereto were filed on June 26, 1925.

The intervening petition of the United States of America was filed on January 29, 1926.

The answers of the defendants to said intervening petition was filed on March 10, 1926.

The amended petition of intervention of the United States was filed on April 23, 1926.

Neither defendant was arrested, no bail was taken, and no property was attached or arrested.

The trial was had before Hon. John C. Knox, district judge, on November 16, 17, 18, 19, 22, 23, and 24, 1926.

No question was referred to a commissioner, master, or referee.

A final decree on the merits was entered on November 21, 1927.

An appeal from said decree, taken by the American Baptist Home Mission Society, was dismissed by an order of this court filed May 14, 1928.

3 The decree on the mandate of this court was entered in the District Court on May 28, 1928.

An application by the defendant mission society to the Supreme Court of the United States for a writ of certiorari was denied by said Supreme Court on October 22, 1928.

Motions by the plaintiff's counsel and the prochein ami for allowances for their services and disbursements were made on November 9, 1928, and were heard before Hon. John C. Knox, district judge.

The decree upon said applications (being the decree appealed from), was made on January 8, 1929.

This appeal was taken on January 22, 1929.

4 In United States District Court, Southern District of New York

JACKSON BARNETT, A MENTAL INCOMPETENT, BY ELMER S. Bailey, his prochein ami, plaintiff
against
THE EQUITABLE TRUST COMPANY OF NEW YORK AND THE American Baptist Home Mission Society, defendants
} E-31/91

Amended bill of complaint

To the honorable the Judges of the District Court of the United States for the Southern District of New York, in Equity:

The above-named plaintiff, a citizen of the State of Oklahoma, brings this his amended bill of complaint in equity by Elmer S. Bailey, a citizen of Oklahoma and his prochein ami, against the above-named defendants, The Equitable Trust Company of New York and the American Baptist Home Mission Society, each of which is a corporation organized and existing under the laws of the State of New York and a citizen of said State, having its principal office in and being an inhabitant of the Southern District of New York, and said plaintiff thereupon shows unto the court and upon information and belief alleges:

5 First. The names, citizenship, and residences of the parties to this bill are as set forth in the foregoing introduction to this bill, and this suit presents a controversy wholly between citizens of different States and the jurisdiction of this court is based upon such diversity of citizenship.

Second. Jackson Barnett is approximately seventy-five years of age and at all times herein mentioned he was an imbecile, ignorant.

uneducated, and unable to read or write, and wholly incapable of understanding and comprehending the value, condition, character, nature, and extent of his estate or any part thereof, and incapable of caring for himself and managing his property, and incapable of discerning or appreciating the motives and designs of any person or persons with whom he came in contact, and wholly incapable of comprehending or understanding any of the written instruments, purported trusts, requests, and agreements hereinafter mentioned.

Third. Jackson Barnett is a full-blood member of the Muskogee or Creek Tribe of Indians, enrolled opposite roll No. 4254 of the approved Creek rolls, and as such was under the laws and treaties of the United States entitled to an allotment of land in the Indian Territory. Being an incompetent as aforesaid, he failed to make any selection of allotment as provided in said laws and treaties, and there was arbitrarily allotted to him the following-described lands, to wit:

"Southeast quarter (SE. ¼) of section five (5), Township seventeen (17) north, Range seven (7) east, Creek County Oklahoma."

6 Fourth. Prior to April, 1912, the Congress of the United States had conferred upon the County Courts of the State of Oklahoma (which are the courts exercising probate jurisdiction) full and complete jurisdiction of the persons and estates of minors and incompetents, whether Indians, freedmen, or otherwise, and on and prior to said date there were in force in the State of Oklahoma certain statutes of said State, now sections 1449, 1450, 1451, and 4983 of the Compiled Statutes of Oklahoma, 1921, which provide as follows:

"1449. PETITIONS FOR GUARDIANS OF INCOMPETENT OR INSANE PERSONS. When it is represented to the county court upon verified petition of any relative or friend, that any person is insane, or from any cause mentally incompetent to manage his property, the judge must cause notice to be given to the supposed insane or incompetent person, of the time and place of hearing the case, not less than five days before the time so appointed, and such person, if able to attend, must be produced before him on the hearing.

"1450. GUARDIAN APPOINTED, WHEN. If after a full hearing and examination upon such petition, it appears to the judge of the county court that the person in question is incapable of taking care of himself and managing his property, he must appoint a guardian of his person and estate, with the powers and duties in this article (chapter) specified.

"1451. BOND AND POWERS OF GUARDIAN. Every guardian
7 appointed as provided in the preceding section, has the care and custody of the person of his ward, and the management of all his estate, until such guardian is legally discharged; and he must give bond to such ward, in like manner and with like conditions, as before prescribed with respect to the guardian of a minor.

"4983. JUDICIAL DETERMINATION OF INCAPACITY. After his incapacity has been judicially determined a person of unsound mind can

make no conveyance or other contract, nor designate any power nor waive any right, until his restoration to capacity is judicially determined. But if actually restored to capacity he may make a will, though his restoration is not thus determined."

Fifth. Pursuant to the acts of Congress and the laws of the State of Oklahoma as aforesaid, proceedings were duly had in the County Court of Okmulgee County (said county being the place of residence of said incompetent and said court having jurisdiction of his person and estate) whereby on the 29th day of April, 1912, said plaintiff was adjudged to be mentally incompetent and Carl J. O'Hornett was appointed guardian of his person and estate. Said O'Hornett thereupon duly qualified and assumed the duties of such guardianship and continued to act in such capacity until the 13th day of June, 1923, at which time he resigned, and Elmer S. Bailey was on said date duly appointed as the successor of the said Carl J. O'Hornett, and said

Elmer S. Bailey on said date duly qualified as the guardian
8 of said incompetent and assumed the duties of such guardianship and has been at all times since, and now is, acting in such capacity.

Sixth. At all times prior to October, 1922, the Secretary of the Interior of the United States had construed the acts of Congress as conferring jurisdiction of the estates of minors and incompetent Indians upon the County Courts of Oklahoma and had recognized the jurisdiction of such courts by the rules and regulations of his department, which provide:

"All royalties, rents, or payments accruing under any lease made for or on behalf of any minor or incompetent shall be deposited by the Indian agent or other Government officer to whom paid, to the credit of the guardian or curator of such minor or incompetent, in some national bank or banks designated by the Commissioner of Indian Affairs, and may be withdrawn therefrom by such guardian or curator, with the consent of the United States Indian agent, in sums not exceeding $50 per month unless otherwise ordered by the court. Sums in excess of $50 per month may be withdrawn on order of the proper court and not otherwise. Such designated banks shall furnish satisfactory surety bonds, to be approved by the Secretary of the Interior guaranteeing the safe care and custody of the funds so deposited."

Amended July 23, 1910, as follows:

"All royalties, rents, or payments accruing under any lease
9 made for or on behalf of any minor or incompetent shall be held by the United States Indian superintendent, Union Agency, or such other disbursing officer as may be designated by the Secretary of the Interior, to the credit of the guardian (or curator) of such minor or incompetent and shall be paid to such guardian (or curator) upon voucher executed by him and approved by the judge of the County (probate) Court having jurisdiction of the estate of such minor or incompetent (the form of such voucher to be

prescribed by the department), or upon authority to said superintendent or other officer in charge of the Union Agency."

Seventh. At all times prior to the transactions hereinafter complained of, Jackson Barnett was recognized as a mental incompetent and Carl J. O'Hornett was recognized as his legal guardian by the Secretary of the Interior, the Commissioner of Indian Affairs, the Superintendent for the Five Civilized Tribes, and by all other officers or branches of the Department of the Interior with which he came in contact, and large sums of money held for said incompetent were paid by the Department of the Interior to said guardian for the use and benefit of said incompetent, upon orders of the County Court of Okmulgee County, Oklahoma, and no part of the funds of said incompetent held by the Department of the Interior were paid out by said department other than to or through the said Carl J. O'Hornett as the guardian of said incompetent upon order of said County Court.

10 Eighth. On or about the 22nd day of August, 1912, Carl J. O'Hornett, as guardian of Jackson Barnett, entered into a certain lease contract with H. U. Bartlett, whereby he leased to the said H. U. Bartlett the allotment of said Jackson Barnett above described for oil and gas purposes for a period of ten years from the date of the approval thereof by the Secretary of the Interior and as much longer thereafter as oil or gas should be found in paying quantities. A copy of said lease contract is hereto attached, marked "Exhibit A" and made a part hereof.

Ninth. Said lease contract was made on a form prescribed by the Secretary of the Interior and provided for the payment of the royalties for oil and gas produced therefrom to the United States Indian superintendent, Union agent, Muskogee, Oklahoma, for Jackson Barnett, and said lease was duly approved by the Secretary of the Interior on the 13th day of September, 1912.

Tenth. The office of Commissioner of Five Civilized Tribes and the office of United States Indian superintendent were abolished by act of Congress dated August, 1914, and in lieu of said two separate offices there was created the office of Superintendent for the Five Civilized Tribes.

Eleventh. Pursuant to said lease contract, the lessee and his respective assigns went into possession of said lands and produced oil and gas therefrom in large and paying quantities, and pursuant to the terms and conditions of said lease the royalties and bonuses

11 for oil and gas on said leased premises were paid to the United States superintendent until that office was abolished as aforesaid, and thereafter to the Superintendent for the Five Civilized Tribes, and on and prior to January, 1920, there had accumulated in the hands of the Superintendent for the Five Civilized Tribes from said royalties and bonuses for the use and benefit of said incompetent a large sum of money in excess of one million dollars.

Twelfth. Prior to January, 1920, a number of articles were published in various newspapers and circulated generally throughout the United States concerning Jackson Barnett and his immense wealth, and he became reputed to be the richest Indian in the world.

Thirteenth. Among other persons, one Anna Laura Lowe, who now claims to be the legal wife of Jackson Barnett, heard of said incompetent and his great wealth through said newspaper reports, and she thereupon conceived the idea of kidnapping and marrying him with a view to obtaining his fortune or a substantial portion thereof, and she conspired and agreed with certain persons unknown to this plaintiff to kidnap and defraud said incompetent by various means out of his estate, or a substantial portion thereof, and in pursuance of such conspiracy and fradulent designs, and in or about January, 1920, said Anna Laura Lowe, knowing of said incompetent only through newspaper reports and having never seen him, went to Henryetta, Oklahoma, where she engaged a taxicab and was driven to the home of said incompetent, a few miles distance from
12 said city, and under the pretense that she desired him to show her the residence of a certain Indian she induced him to enter said taxicab and caused the same to be driven to Okemah, Oklahoma, a distance of about twenty miles, the county seat of Okfuskee County, Oklahoma, where she applied for a license to marry said incompetent, but which application was denied; and thereupon said Anna Laura Lowe caused said incompetent to be taken to Holdenville, Oklahoma, a distance of about forty miles from Okemah, and the county seat of Hughes County, Oklahoma, where she again applied for license to marry said incompetent, but which application was denied, and thereupon said Anna Laura Lowe, at the instance of the sheriff of Hughes County, Oklahoma, returned said incompetent to his home.

Fourteenth. Thereafter, and about three weeks later and in the month of February, 1920, said Anna Laura Lowe returned to the home of said incompetent in a high-powered automobile accompanied by one Moorehead and his wife, arriving at the home of said incompetent about midnight, and either by her persuasion and deductive wiles, or by force, or both, induced said incompetent to enter said automobile and caused same to be driven all night, arriving in Coffeyville, Kansas, a distance of about 150 miles, on the following morning, where a marriage license was procured and a purported marriage ceremony performed, purporting to unite said Anna Laura Lowe and said incompetent in holy matrimony; and thereupon said Anna Laura Lowe caused said incompetent to be transported across the border line into the State of Missouri, where another
13 marriage license was procured and another purported marriage ceremony performed, purporting to unite Anna Laura Low and said incompetent in matrimony. Each of said marriage ceremonies is void and of no effect for the reason that said incompetent was an imbecile and incapable of understanding the nature of a marriage contract and incapable of entering into a valid marriage.

Fifteenth. At all times herein mentioned said Anna Laura Lowe intended to deceive and defraud said incompetent of his property and her purpose in kidnapping and entering into a purported marriage with said incompetent was to defraud him of his estate.

Sixteenth. At all times since Anna Laura Lowe took said incompetent from his home and entered into said purported marriage with him she has kept him practically incommunicado, refusing to permit him to see and talk with his guardian, relatives, friends, or members of his race, except on a few occasions in the presence of said Anna Laura Lowe, and for a time after said purported marriage, said Anna Laura Lowe kept said incompetent behind locked doors in a room in a hotel at Coffeyville, Kansas, and refused to permit him to leave except when accompanied by her, and she has at all times since dominated said incompetent and subjected him to her will.

Seventeenth. Said Anna Laura Lowe entered into said purported marriage with said incompetent solely for the purpose of carrying out her designs to acquire possession of his estate, and either
14 prior to said purported marriage or immediately thereafter she employed, among other persons, one Harold C. McGugin, of Coffeyville, Kansas, to aid and assist in securing possession and control of a large part of the estate of said incompetent then held by the Superintendent for the Five Civilized Tribes, and she agreed to pay them a large sum in the event they should be able to secure for her from said incompetent's estate as much as $550,000.00.

Eighteenth. Prior to December 15th, 1922, there had accumulated in the hands of the Superintendent for the Five Civilized Tribes, for the use and benefit of said incompetent, from royalties from oil and gas from his allotment as aforesaid, a sum in excess of $1,100,000.00, which funds had been transferred by the Superintendent for the Five Civilized Tribes to the Secretary of the Interior and by him invested in United States Liberty loan bonds, or said funds had been invested by the Superintendent for the Five Civilized Tribes in United States Liberty bonds and said bonds forwarded to the Secretary of the Interior, all of which, as your plaintiff is informed and believes, was without authority of law.

Nineteenth. During the years 1921 and 1922, and possibly part of the year 1923, one A. J. Ward was Creek national attorney with offices at Muskogee, Oklahoma, whose duty it was to represent the Creek Tribe of Indians in tribal matters and to protect them in their property rights.

Twentieth. Sometime prior to December, 1922, said Anna
15 Laura Lowe, Harold C. McGugin, A. J. Ward, and probably others, entered into a conspiracy for the purpose of extracting from said incompetent's estate a large sum of money, and for the purpose of carrying out said conspiracy said Harold C. McGugin and A. J. Ward went to Washington, D. C., in the month of October or November, where they negotiated with the Commissioner of Indian Affairs, Charles H. Burke, and the Secretary of the Interior, Albert B. Fall, or one of his assistants, and arrangements were made between the said Harold C. McGugin, A. J. Ward, and Commissioner of Indian

Affairs and Assistant Secretary of the Interior whereby United States Liberty loan bonds of the par value of $550,000.00, then held by the Secretary of the Interior for said incompetent, should be delivered to Anna Laura Lowe and whereby other United States Liberty loan bonds of said incompetent of the par value of $550,000.00 should be delivered to the defendant The American Baptist Home Mission Society under a certain purported trust agreement whereby said incompetent should receive a part of the income therefrom during his lifetime.

Thereupon, through communication from Harold C. McGugin, A. J. Ward, or the Commissioner of Indian Affairs to Anna Laura Lowe, she was requested to take said incompetent to Washington, D. C., for the purpose of carrying out the disbursement of the funds of said incompetent as aforesaid, and thereupon said Anna Laura Lowe took said incompetent to Washington, D. C., and induced him to place his thumb mark on a communication addressed to the Secretary of the Interior, through the Commissioner of Indian Affairs,
a copy of which is attached hereto as Exhibit B.

16 Said instrument was prepared by A. J. Ward and Harold C. McGugin, or one of them, and was prepared for the purpose of carrying out the previous designs of said Anna Laura Lowe to acquire possession and control of said incompetent's estate, and the provision for the trust fund in favor of the defendant The American Baptist Home Mission Society was inserted for the purpose of giving a color of philanthropy to the entire transaction.

Said incompetent had no part in the negotiation for the distribution of his estate as aforesaid, had no knowledge of the proposed distribution, had never heard of the American Baptist Home Mission Society, had no desire or intention, and was incapable of forming any desire or intention, to distribute his estate as aforesaid, and was incapable of understanding or comprehending the nature, extent, purpose, and effect of such distribution; and said purported communication to the Secretary of the Interior was not read to or explained to him, and he could not have understood or comprehended the meaning, nature, and extent of the same nor of the proposed distribution of his estate had the same been read or explained to him.

Said communication to the Secretary of the Interior is not the act of this plaintiff, but is the act and will of Anna Laura Lowe and her co-conspirators.

The thumb mark of this plaintiff was affixed to said instrument solely through the domination of Anna Laura Lowe, as aforesaid, and at the time of affixing his thumb mark to said instrument, as aforesaid, Anna Laura Lowe was present and surrounded by her
counsel and co-conspirators, and this plaintiff did not have the

17 benefit of counsel to represent and advise him, and although negotiations for said distribution were pending for several months all knowledge of the same was kept from the guardian of

this plaintiff, from his attorney, his relatives and friends in Oklahoma, from the County Court of Okmulgee County, Oklahoma, from the United States probate attorney having jurisdictjon in Okmulgee County, Oklahoma, and from the office of the Attorney General of the United States.

Twenty-first. Said instrument of gift was presented to the Commissioner of Indian Affairs and by him recommended to the Secretary of the Interior for approval, and the Secretary of the Interior, through his assistant, assumed to approve the same and authorize the distribution of the funds of said incompetent as requested in said communication.

Twenty-second. Pursuant to said purported instrument of gift as aforesaid there were delivered to said Anna Laura Lowe (sometimes designated as Anna Laura Barnett), as part of the funds held by the Secretary of the Interior for the use and benefit of said incompetent as aforesaid, United States Liberty loan bonds of the par value of $550,000.00, and said bonds, to the extent of the par value of $200,000.00, were placed in the Riggs National Bank of Washington, D. C., under a trust agreement between said bank and Anna Laura Barnett, and the balance of said bonds were appropriated to the use of Anna Laura Lowe, her counsel, and co-conspirators.

18 Twenty-third. Pursuant to said purported instrument of gift as aforesaid there were delivered to the defendant The American Baptist Home Mission Society, as part of the funds held by the Secretary of the Interior for the use and benefit of said incompetent as aforesaid, United States Liberty loan bonds of the par value of $550,000, and said defendant thereupon delivered said $550,000 of bonds to the defendant The Equitable Trust Company of New York under an agreement that said Trust Company should hold said bonds or the proceeds thereof as trustee during the life of said incompetent (meanwhile paying all income therefrom in excess of $20,000 in any one year to said The American Baptist Home Mission Society) and upon his death to deliver said bonds or the proceeds thereof to said defendant The American Baptist Home Mission Society.

Said defendant The Equitable Trust Company of New York thereupon received said $550,000 par value of bonds and has continued to hold and still continues to hold the same or the proceeds thereof.

Twenty-fourth. The Secretary of the Interior, under and by virtue of the various acts of Congress of the United States, was wholly without jurisdiction or authority to approve said purported request for distribution of the estate of said incompetent, or to pay out or authorize the payment of said funds to any person other than to or through the legal guardian of said incompetent upon proper order of the County Court of Okmulgee County, Oklahoma.

19 Twenty-fifth. The purported approval of the Secretary of the Interior operated merely as a voluntary surrender of the

possession and supervision of said funds and added no validity to said transaction.

Twenty-six. The Secretary of the Interior was further without jurisdiction or authority to pay out said funds, as requested in said purported communication, for the reason that said funds were paid to the Superintendent for the Five Civilized Tribes solely by virtue of the lease contract entered into by the guardian of said incompetent as aforesaid, and but for the stipulation therein contained that said funds should be paid to the United States Indian superintendent the person occupying that office would have had no right or authority to collect or receive the same; and said provision of said lease is invalid and conferred no right upon the person occupying the office of the United States Indian superintendent or of the Superintendent for the Five Civilized Tribes to collect, receive, or hold said royalties and bonuses, for the reason that said guardian was by law charged with the duty of collecting, receiving, holding, and managing said fund, and was wholly without right or authority of law to delegate such duty to any person whatsoever, and by reason thereof the person collecting, receiving, or holding said funds, pursuant to the terms of said lease contract, held the same as a constructive trustee for said guardian, and upon acquiring possession thereof the Secretary of the Interior held the same as a successful constructive trustee, and the rules and regulations promulgated by the Secretary of the Interior with reference to the collection, holding, and disbursement of funds belonging to restricted Indian lawfully received by the Department of the Interior were wholly inapplicable to the funds in question.

Twenty-seventh. Plaintiff further states that the purported approval of the Secretary of the Interior of the distribution of said funds was procured by misrepresentation of facts made in said communication to the Secretary of the Interior through the Commissioner of Indian Affairs, written at the instance of Anna Laura Lowe and by her employees and co-conspirators.

In said instrument it was falsely and fradulently represented that said incompetent had no living relatives or kindred who, either by ties of blood or by their conduct toward said incompetent, were entitled to any part of his estate or to any consideration from him whatsoever; that no living relative, prior to the time said incompetent became wealthy, manifested any interest in him; that said Anna Laura Lowe was a faithful and loving wife; and that she had shown said incompetent every consideration; whereas this plaintiff alleges and states that in truth and in fact he had living at that time and now has living a half brother, David Barnett, who then and now resides near the city of Henryetta, Okmulgee County, Oklahoma, and is a full-blood Creek Indian; and in truth and in fact said incompetent, prior to the time said incompetent became wealthy, lived with his said half-brother, who cared for him and provided for him until such time as he was able to purchase a home of his own

and provide servants for his care; and in truth and in fact
21 Anna Laura Lowe, at all times since her purported marriage to said incompetent, has kept him in virtual captivity, refusing to permit him to see or communicate with his guardian, his friends, his relatives, and members of his tribe, and all pretended affection bestowed upon said incompetent by Anna Laura Lowe was for the sole purpose of extracting a large sum of money from his estate.

Twenty-eighth. One M. L. Mott was a friend of the Commissioner of Indian Affairs, Charles H. Burke, and such relationship being known to said Anna Laura Lowe and to her counsel and co-conspirators, Harold C. McGugin and A. J. Ward, the said M. L. Mott was employed on behalf of Anna Laura Lowe for the purpose of assisting in consummating the transaction, and he did assist in some manner unknown to this plaintiff and by means of representations the exact nature of which this plaintiff has no actual knowledge; but probably in part on account of the participation of the said M. L. Mott and through his influence the Commissioner of Indian Affairs was induced to accept as true and correct the false statements set forth in said instrument of gift and to recommend the same for approval.

Twenty-ninth. Immediately after the purported marriage of Anna Laura Lowe to said incompetent the Department of Interior caused an investigation of the past life of said Anna Laura Lowe to be made by Secret Service agents, and such Secret Service agents made a detailed report to the Department of the Interior, which report, for a long time prior to said distribution, was on file in the office of the Commissioner of Indian Affiairs, and of which the said commissioner had knowledge.

22 Said report disclosed the state of mentality of said incompetent, describing him as a simple-minded and mentally incompetent and under guardianship, and further disclosed that Anna Laura Lowe, prior to her marriage to said incompetent, was a designing and unscrupulous adventuress, of bad moral character, all of which will more fully appear from the report itself, which this plaintiff is prepared to exhibit upon the trial of this cause.

In recommending for approval the distribution whereby said Anna Laura Lowe (or Barnett) should receive out of the estate of said incompetent the sum of $550,000.00, and whereby the defendants herein should receive another $550,000.00 out of the estate of said incompetent, the Commissioner of Indian Affairs abused has discretion, and the Secretary of the Interior, if he had jurisdiction to approve the same (which this plaintiff denies) and if he had knowledge of the circumstances under which the purported marriage of Anna Laura Lowe to said incompetent took place, of the character of Anna Laura Lowe and of her designs upon the estate of said incompetent, and of his incompetency, and of the manner in which said purported written request was procured, abused his discretion

in approving said distribution, and if the Secretary of the Interior did not have knowledge of said facts his approval of said distribution was procured by fraud, imposition, deceit, and misrepresentation.

Thirtieth. Since said distribution was made the Commissioner of Indian Affairs and the Secretary of the Interior have been fully advised of all the circumstances surrounding said distribution, as herein set forth, and they have been requested to assist in
23 recovering said funds, but that they and each of them have refused so to do, and on the contrary are actively co-operating with and assisting Anna Laura Barnett to establish the validity of said distribution and to prevent the recovery thereof by said incompetent.

Thirty-first. The plaintiff does not know and can not state the exact description, serial numbers, or denomination of said $550,000.00 par value of bonds, but avers that such information is in the possession of the defendants, and plaintiff does not know what part, if any, of said bonds has been sold or redeemed by said defendant The Equitable Trust Company of New York since it received said bonds as aforesaid or the nature of the securities or other property in which the proceeds of any bonds sold or redeemed by said defendant have been invested and avers that such information is in the possession of said defendant.

Thirty-second. Since February 1, 1923, said defendant trust company has collected a large amount of interest upon said bonds, the exact amount of which is unknown to this plaintiff or to his guardian or next friend, and such interest is either still in the possession of said defendant or has been unlawfully disposed of in violation of the plaintiff's rights, of which the said defendants had due notice.

Thirty-third. The defendants and each of them knew, at the time they received said $550,000.00 par value of bonds, that the plaintiff, Jackson Barnett, was the owner thereof and that said plaintiff was mentally incompetent and that a guardian of his
24 person and estate had been appointed by the County Court of Okmulgee County, Oklahoma, and that such guardian was still the duly appointed, qualified, and acting guardian of the person and estate of the said Jackson Barnett.

Thirty-fourth. The defendants and each of them have failed and refused to account for or to pay over to the plaintiff the said $550,000.00 par value of said bonds or the proceeds or interest or income thereof.

Thirty-fifth. The plaintiff has no adequate remedy at law.

Forasmuch, therefore, as the plaintiff is without remedy according to the strict rules of the common law and can have relief only in a court of equity where matters of this kind are properly cognizable, he therefore prays:

1. That the said defendants be required to answer this bill, but not under oath.

2. That the said defendants be required to discover and disclose to the plaintiff the exact description, serial numbers, and denominations of said $550,000.00 par value of bonds; the exact description, serial numbers, and denominations of such of said bonds as shall have been sold or disposed of or redeemed; the amount of all interest and income which said defendants or either of them has received in respect to said bonds; and the exact description of any and all property in which the proceeds, if any, of any of said bonds may have been invested.

25 3. That the defendants be declared to have received and now to hold said $550,000.00 par value of bonds, and the interest, income, and proceeds thereof, and any property, real or personal, in which the proceeds or income of said bonds or any of them may have been invested, as the property of the plaintiff; that the said bonds and the interest, income, and proceeds thereof and any property in which any of the proceeds of said bonds, interest, or income may have been invested be impressed with a trust in favor of the plaintiff; that said defendants be required and compelled to account for said bonds and the interest, income, and proceeds thereof; that the said defendants be required to transfer and turn over to the plaintiff such bonds as are now in their possession, together with the proceeds of such bonds as shall have been sold or redeemed, and all interest and income which have accrued in respect to such bonds since the date of their receipt thereof; and in case the proceeds of any of said bonds have been invested in real or personal property, that said defendants be required to turn over to this plaintiff such real or personal property.

4. That the plaintiff have such other, further, different, and general relief in the premises as the nature or the circumstances of the case may require and as to equity may seem just and proper.

PATTERSON, EAGLE, GREENOUGH & DAY,
Solicitors for Plaintiff,
120 Broadway, Borough of Manhattan, City of New York.

26 CARROLL G. WALTER,
A member of said Firm and one of the solicitors of Record for the Plaintiff.

HUMMER & FOSTER,
Henryetta, Oklahoma,
COCHRANE & ELLISON,
Okmulgee, Oklahoma,
MCCRORY & MONK,
Okmulgee, Oklahoma,
Counsel for Plaintiff.

[*Duly sworn to by Elmer S. Bailey; jurat omitted in printing.*]

27 *Exhibit A to amended bill of complaint—Lease of allotment*

Office of Indian Affairs. Received Sept. 10, 1912. 89551.
Received Mar. 6, 1912. Union Agency. Enclosure to No. 13597.
Received ——— 1912. Union Agency. Enclosure to Cert. No. 1550.
(Original 22449.) Exhibit A.
(Form A, series 1908, approved April 20, 1908. Amended February 6 and June 29, 1911.)

OIL AND GAS MINING LEASE UPON LAND SELECTED FOR ALLOTMENT—CREEK NATION, OKLAHOMA

This indenture of lease, made and entered into in quadruplicate on this 5th day of March, A. D. 1912, by and between Jackson Barnett and joined in by Carl J. O'Hornett, as guardian of the said Jackson Barnett, an incompetent, of Sharp, Oklahoma, enrolled as a full-blood citizen of the Creek Nation, roll No. 4524, party of the first part, hereinafter designated as lessor, and H. U. Bartlett of Mennford, Oklahoma, party of the second part, hereinafter designated as lessee, under and in pursuance of the provisions of the act of Congress approved May 27, 1908 (35 Stat. L. P. 312), witnesseth:

28 1. The lessor, for and in consideration of one dollar, the receipt whereof is acknowledged, and the royalties, covenants, stipulations, and conditions hereinafter contained and hereby agreed to be paid, observed, and performed by the lessee, does hereby demise, grant, lease, and let unto the lessee, for the term of ten years from the date of the approval hereof by the Secretary of the Interior, and as much longer thereafter as oil or gas it found in paying quantities, all the oil deposits and natural gas in or under the following-described tract of land, lying and being within the county of Creek and State of Oklahoma, to wit: The southeast quarter (SE. ¼) of section five, Township 17 N., Range 7 E. of the Indian meridian, and containing 160 acres, more or less, with the exclusive right to prospect for, extract, pipe, store, and remove oil and natural gas, and to occupy and use so much only of the surface of said land as may reasonably be necessary to carry on the work of prospecting for, extracting, piping, storing, and removing such oil and natural gas, also the right to obtain from wells or other sources on said land by means of pipe lines or otherwise a sufficient supply of water to carry on said operations, and also the right to use, free of cost, oil and natural gas as fuel so far as necessary to the development and operation of said property.

2. The lessee hereby agrees to pay or cause to be paid to the United States Indian superintendent, Union Agency, Muskogee, Oklahoma, for the lessor, as royalty, the sum of 12½ per cent of the gross proceeds of all crude oil extracted from the said land,
29 such payment to be made at the time of sale or removal of

the oil. And the lessee shall pay as royalty on each gas-producing well three hundred dollars per annum in advance, to be calculated from the date of commencement of utilization: Provided, however, in the case of gas wells of small volume, when the rock pressure is one hundred pounds or less, the parties hereto may, subject to the approval of the Secretary of the Interior, agree upon a royalty which will become effective as a part of this lease; Provided, further, that in case of gas wells of small volume, or where the wells produce both oil and gas or oil and gas and salt water to such an extent that the gas is unfit for ordinary domestic purposes, or where the gas from any well is desired for temporary use in connection with drilling and pumping operations on adjacent or near-by tracts, the lessee shall have the option of paying royalties upon such gas wells of the same percentage of the gross proceeds from the sale of gas from such wells as is paid under this lease for royalty on oil. The lessor shall have the free use of gas for domestic purposes in his residence on the leased premises provided there be a surplus gas produced on said premises over and above enough to fully operate the same. Failure on the part of the lessee to use a gas-producing well, which can not profitably be utilized at the rate herein prescribed, shall not work a forfeiture of this lease so far as the same relates to mining oil, but if the lessee desires to retain gas-producing privileges, the lessee shall pay a rental of one hundred dollars per annum, in advance, calculated from date of discovery of gas, on each gas-producing well, gas from which is not marketed or not utilized otherwise than for operations under this lease.

Payments of annual gas royalties shall be made within twenty-five days from the date such royalties become due, other royalty payments to be made monthly on or before the 25th day of the month succeeding that for which such payment is to be made, supported by sworn statements.

3. Until a producing well is completed on said premises the lessee shall pay, or cause to be paid, to the superintendent, Union Agency, Muskogee, Oklahoma, for lessor, as advance annual royalty, from the date of the approval of this lease, fifteen cents per acre per annum, annually, in advance, for the first and second years; thirty cents per acre per annum, annually, in advance, for the third and fourth years; seventy-five cents per acre per annum, annually, in advance, for the fifth year, and one dollar per acre per annum, annually, in advance, for such succeeding year of the term of this lease; it being understood and agreed that such sums of money so paid shall be a credit on stipulated royalties, and the lessee hereby agrees that said advance royalty when paid shall not be refunded to the lessee because of any subsequent surrender or cancellation thereof; nor shall the lessee be relieved from its obligation to pay said advance royalty annually when it becomes due, by reason of any subsequent surrender or cancellation of this lease.

The lessee shall exercise diligence in sinking wells for oil and natural gas on land covered by this lease and shall drill at least one well thereon within one year from date of approval of this lease by the Secretary of the Interior, or shall pay to the United States Indian superintendent, Union Agency, Muskogee, Oklahoma, for the use and benefit of the lessor, for each whole year the completion of such well is delayed after the date of such approval by the Secretary of the Interior, for not to exceed ten years from the date of such approval, in addition to the other consideration named herein, a rental of one dollar per acre, payable annually; and if the lessee shall fail to drill at least one well within any such yearly period and shall fail to surrender this lease by executing and recording a proper release thereof and otherwise complying with paragraph numbered 7 hereof on or before the end of any such year during which the completion of such well is delayed, such failure shall be taken and held as conclusively evidencing the election and covenant of the lessee to pay the rental of one dollar per acre for such year, and thereupon the lessee shall be absolutely obligated to pay such rental. The failure of the lessee to pay such rental before the expiration of fifteen days after it becomes due at the end of any yearly period, during which a well has not been completed as provided herein, shall be a violation of one of the material and substantial terms and conditions of this lease, and be cause for cancellation of such lease under paragraph 9 hereof; but such cancellation shall not in any wise operate to release or relieve the lessee from the covenant and obligation to pay such rental, or any other accrued obligation. The lessee may be required by the Secretary of the Interior, or by such officer as may be designated by him for the purpose, to drill and operate wells to offset wells on adjoining tracts, and within three hundred feet of the dividing line, or in case of gas wells, lessee may have the option, in lieu of drilling offset wells, of paying a sum equal to the royalties which would accrue on each well to be offset if said wells had been drilled and were being operated on the land described herein and in accordance with the terms hereof. It is understood and agreed by the parties hereto that offset wells shall be drilled, or royalty paid in lieu of drilling, within ten days after the lessee is notified to do so, and failure to comply with such requirement shall constitute a violation of one of the substantial terms of this lease.

5. The lessee shall carry on development and operations in a workmanlike manner, commit no waste on the said land and suffer none to be committed upon the portion in his occupancy or use, take good care of the same, and promptly surrender and return the premises upon the termination of this lease to lessor or to whomsoever shall be lawfully entitled thereto, unavoidable casualties excepted; shall not remove therefrom any building or permanent im-

provements erected thereon during the said term of the said lessee, but said buildings and improvements shall remain a part of said land and become the property of the owner of the land as a part of the consideration for this lease, excepting the tools, derricks, boilers, boiler houses, pipe lines, pumping and drilling outfits, tanks, engines and machinery, and the casing of all dry or exhausted wells which shall remain property of the lessee, and may be removed at any time prior to sixty days after the termination of the lease by forfeiture or otherwise; and shall not permit any nuisance to be maintained on the premises under lessee's control, nor allow
33 any intoxicating liquors to be sold or given away for any purpose on such premises; shall not use such premises for any other purpose than those authorized in the lease; and before abandoning any well shall securely plug the same so as effectually to shut off all water from the oil-bearing stratum, or in the manner required by the laws of the State of Oklahoma.

6. The lessee shall keep an accurate account of all oil-mining operations, showing the sales, prices, dates, purchases, and the whole amount of oil mined or removed, and all sums due as royalty shall be a lien on all implements, tools, movable machinery, and all other personal chattels used in operating said property, and upon all of the unsold oil obtained from the land herein leased, as security for payment of said royalty.

7. The lessee may at any time, by paying to the Indian superintendent all amounts then due as provided herein and the further sum of one dollar, surrender and cancel this lease and be relieved from all further obligation or liability thereunder: Provided, if this lease has been recorded lessee shall execute a release and record the same in the proper county recording office: Provided, further, in event restrictions are removed from all leased premises, the lessee may surrender all the undeveloped portion thereof, by paying the lessor all amounts then due and the further sum of one dollar, which surrender shall not affect the terms thereof as to each producing well and ten acres of said premises as nearly in square form as possible next contiguous to and surrounding each of said wells, and execute and record a cancellation of premises surrendered.

34 8. This lease shall be subject to the regulations of the Secretary of the Interior, now or hereafter in force, relative to such leases, all of which regulations are made a part and condition of this lease: Provided, however, That no regulations made after the approval of this lease, effecting either the len'th of term of oil and gas leases, the rates of royalty or payment thereunder, or the assignment of leases, shall operation to affect the terms and conditions of this lease.

9. Upon the violation of any of the substantial terms and conditions of this lease the Secretary of the Interior (or lessor, in event restrictions are removed as provided in paragraph 12 hereof)

shall have the right, at any time after thirty days' notice to the lessee specifying the terms or conditions violated, to declare this lease null and void, and the lessor shall then be entitled and authorized to take immediate possession of the land.

10. Before this lease shall be in force and effect the lessee shall furnish a bond with responsible surety to the satisfaction of the Secretary of the Interior, and such further bond or bonds as may be required by said secretary conditioned for the performance of this lease, which bond shall be deposited and remain on file in the Indian office.

11. Assignment of this lease or any interest therein may be made with the approval of the Secretary of the Interior, it being understood that to secure such approval the proposed assignee need only be qualified to hold such a lease under the rules and regulations, and furnish a bond with responsible surety to the satisfaction of the Secretary of the Interior, conditioned for the faithful performance of the covenants and conditions of this lease.

12. In the event restriction on alienation shall be removed from all the leasehold premises described above, this lease shall be released from the supervision of the Secretary of the Interior such release to take effect without further agreement, from the date such restrictions are removed, and thereupon the authority and power delegated to the Secretary of the Interior as herein provided shall cease, and all payments required to be made to the United States Indian superintendent shall thereafter be made to lessor or the then owner of said lands in the person or be deposited to the credit of said lessor or his assigns at the First National Bank of Okmulgee, Oklahoma, or at such other place as the said lessor or his assigns may from time to time designate in writing, and changes in regulations thereafter made by the Secretary of the Interior applicable to oil and gas leases shall not apply to this lease.

13. Each and every clause and covenant in this indenture shall extend to the heirs, executors, administrators, successors, and lawful assigns of the parties hereto.

14. In witness whereof the said parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned.

JACKSON (his mark) BARNETT. [SEAL.]

Attest:

Two witnesses to execution by lessor:

THOMAS J. POWER,
Dist. Agent, P. O. Okmulgee, Okla.

TIM RANDALL,
P. O. Henryetta, Okla.

H. U. BARTLETT. [SEAL.]
CARL J. O'HORNETT, [SEAL.]
As Guardian of Jackson Barnett as incompetent.

By the request of Jackson Barnett I wrote his signature on this instrument and he then affixed his mark in execution thereof in my presence.

N. C. Cox, *Witness.*

Executed in my presence.

TIM RANDALL, *Witness.*

Two witnesses to execution by lessee:
THOMAS J. FOUAR,
P. O. Okmulgee, Okla.
TIM RANDALL,
P. O. Henryetta, Okla.
Witnesses to execution by guardian:
R. S. COTE,
P. O., Muskogee, Okla.
E. J. PHELPS,
P. O. Muskogee, Okla.

37 STATE OF OKLAHOMA,
Muskogee County, ss:

Before me, the undersigned notary public in and for said county and State, on this 22nd day of August, 1912, personally appeared Carl J. O'Hornett, as guardian of the person and estate of Jackson Barnett, an incompetent person, to me known to be the identical person who executed the within and foregoing instrument, and acknowledge to me that he executed the same as his free and voluntary act and deed and in the capacity therein stated for the uses and purposes therein set forth.

In witness whereof I have hereunto set my hand and official seal the day and year last above written.

EDWIN J. PHELPS, *Notary Public.*

My commission expires Nov. 14, 1912.

That it be approved. See my report of even date.

DANA H. KELSEY,
United States Indian Superintendent.

38 STATE OF OKLAHOMA,
County of Okmulgee, ss:

Before me, N. C. Cox, a notary public in and for said county and State, on this 5th day of March, 1912, personally appeared Jackson Barnett, to me known to be the identical person who executed the within and foregoing lease, and acknowledged that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

N. C. Cox, *Notary Public.*

My commission expires Dec. 17th, 1914.

39 DEPARTMENT OF THE INTERIOR,
UNITED STATES INDIAN SERVICE,
Union Agency, Muskogee, Okla., Sept. 7, 1912.

The within lease is forwarded to the Commissioner of Indian Affairs with recommendation that it be approved. See my report of even date.

DANA H. KELSEY,
United States Indian Superintendent.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, D. C., Sept. 12, 1912.

Respectfully submitted to the Secretary of the Interior with recommendation that it be approved.

F. H. ABBOTT,
Assistant Commissioner.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., Sept. 13, 1912.

Approved.

LEWIS C. SAYLIN,
Assistant Secretary of the Interior.

Filed for record this 6th day of Mar., 1912, at 1.30 o'clock p. m.
DANA H. KELSEY,
By R. W. FIELD, *C. C.*

Advance royalty received $24.00.
Original.

40 *Exhibit B to amend bill of complaint—Thumb-mark letter*

WASHINGTON, D. C., *December 15, 1922.*

Hon. ALBERT B. FALL,
Secretary of the Interior
(Through the Commissioner of Indian Affairs.)

SIR: The undersigned, Jackson Barnett, a full-blood Creek Indian citizen enrolled opposite No. 4524, for reasons hereinafter stated, hereby makes the following gifts out of that part of his estate consisting of U. S. Liberty bonds and cash now in the custody and control of the Secretary of the Interior and restricted property under the law, such gifts to be effective immediately and absolutely and to be subject to the approval of the Secretary of the Interior, as herein before provided, and subject to such other terms and conditions as are herein imposed:

1. In consideration of love and effection and in appreciation of the faithful performance of her duties to me as my lawful wife I give to Anna Laura Barnett the sum of $550,000, said sum to be her property absolutely and unconditionally.

2. Having been deprived of the benefits of an education in my youth and early manhood and by reason thereof being fully aware of the disadvantages which accrue to one not equipped with an education and especially to the Indian, it is my desire to promote education among my people to the end that the younger generation may not be handicapped by a lack of education. I give to the American Baptist Home Mission Society, a corporation of 23 East 26th Street, New York City, U. S. Liberty bonds in the sum
41 of $550,000, said bonds or the proceeds thereof, if converted into other securities or investments, to be held and retained by said society as a permanent endowment fund for the use and benefit of Indian University, generally known as Bacone College, an Indian school located at Bacone near Muskogee, Oklahoma, and the Murrow Indian Orphans' Home at Bacone, Oklahoma, the income from such endowment to be utilized and distributed between said school and said orphan's home in such proportions as the board of directors or other supervising body of said society may deem proper and for the best interests of said institutions.

In consideration of said gift said society shall be required to pay to the Superintendent for the Five Civilized Tribes at Muskogee, Oklahoma, for my use and benefit the sum of $20,000 annually payable in quarterly installments so long as I shall live. In the event of the removal of restrictions by operation of law or otherwise, prior to my death, such annual income shall then and thereafter be paid to me personally during my life time. To insure the payment of said $20,000 annually as above provided, said society shall be required to furnish suitable guaranties by bond or other legal and binding obligations, to be approved by the Secretary of the Interior.

For your information and for the information of those who may feel inclined to interest themselves in my affairs I here state that I have no living relatives or kindred who either by ties of blood or by their conduct toward me, ar' entitled to any part of my estate or to any consideration from me whatsoever. During the greater part of my life and until I became wealthy through
42 the development of oil on my allotment, which came late in life, no living relative at any time manifested any interest in me or in my welfare whatsoever, and such aid and assistance as I received in my early life came from those who were not bound to me by the ties of blood or otherwise. Since my wealth has became so great and has attracted so much attention, certain persons who until that time were to all intents and purposes strangers to me have from time to time asserted a relationship with me and have attempted to establish themselves with me on a friendly basis.

Indeed I have been reliably informed that some of these persons claiming relationship have already made contracts on a 50% basis with attorneys for the purpose of establishing a right in my estate upon my death. Whatever legal rights these persons may have

when I die, I wish to say now that they have no moral claim upon me nor upon my estate, and I here and now repudiate them one and all and denounce them as being prompted only by an avaricious desire to participate in my estate upon my death.

I have given to my beloved wife, Anna Laura Barnett, a substantial part of my estate. I am doing this for two reasons: First, because since my marriage to her she has conducted herself toward me in a manner which is wholly commendable and above reproach. She has shown me every consideration and through her I have learned, in a measure, to enjoy the wealth which is mine. From an environment of poverty and degradation in which I lived prior to my marriage to her she has taken me against the most powerful and persistent opposition and has placed me in a comfortable home
43 with pleasant surroundings and living conditions somewhat in keeping with my wealth. For all of this I am deeply appreciative, and I feel that in making this gift to her I am but doing that which every consideration of justice and equity requires me to do.

Furthermore, I have reason to believe that upon my death those persons who now claim to be related to me, and who will dou'tless claim a part of my estate, are now planning to attack the right of my wife to any part of my property. In view of her conduct as my wife and the faithful performance of her duties as such, I feel that I should do no less than to protect her against the inconvenience and uncertainty of such a situation by endowing her with a suitable sum sufficient to her needs, so that whatever may occur after I am gone she will be amply provided for.

To the end that these gifts may be consummated, I respectfully request the approval of the Secretary of the Interior thereto and further request that all details in connection therewith be supervised and attended to by the proper officers of the Interior Department to the end that both the gifts and my future income and the welfare of my wife may be adequately protected and my wishes in regard thereto be carried out in full.

Respectfully submitted,

(Sgd.) JACKSON (his # mark) BARNETT.
His right thumb mark.

Witnesses:

(Signed) A. J. WARD,
Creek National Atty.

44 I, the undersigned Anna Laura Barnett, the lawful wife of Jackson Barnett, hereby consent and agree to the gifts made by Jackson Barnett as herein set forth: In this connection I wish to state that as no part of any consideration for the gifts herein made to me, but to further assure a safe maintenance for my beloved husband, Jackson Barnett, my daughter Maxine Sturgees, and myself, I am placing in an irrevocable trust $200,000, by the terms of which an annual income of approximately $8,000.00 is provided, which in-

sures our support if the unfortunate event should come to pass that all other sources of income should fail. The principal sum of $200,000 cannot be diminished during the life time of Jackson Barnett. I am submitting to you said trust agreement, and as an act of courtesy and kindness to me I respectfully request that you and the proper officers of the Interior Department pass upon such trust as to its legality.

Dated at Washington, D. C., this 15 day of December, 1922.

(Signed) ANNA LAURA BARNETT.

12–EMB–15.

45 In United States District Court

[Title omitted.]

Answer of Equitable Trust Co.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York, in Equity:

The answer of the defendant The Equitable Trust Company of New York to the amended bill of complaint filed herein respectfully shows to the court as follows:

1. Answering the first paragraph of said amended bill, this defendant states that it is without knowledge whether Elmer S. Bailey, referred to therein, is a citizen of Oklahoma, or whether plaintiff is a citizen of Oklahoma or of any other State, and is therefore without knowledge whether this suit presents a controversy wholly between citizen' of different States, and is without knowledge
46 whether said Elmer S. Bailey has any authority or right to sue as prochein ami of plaintiff, and therefore holds plaintiff to strict proof of all thereof; but admits that each of the defendants is a corporation organized and existing under the laws of the State of New York and a citizen of said State, having its principal business office in, and being an inhabitant of, the Southern District of New York.

2. Answering the second paragraph of said amended bill, this defendant states that it is with' knowledge of the age of said Jackson Barnett; it admits that he is and was at all the times mentioned in said amended bill uneducated and unable to read or writ', but it denies that said Jackson Barnett now is or at any of the times mentioned in said amended bill was an imbecile, ignorant, or incapable of understanding or comprehending the value, condition, character, nature, or extent of his estate or any part thereof, or incapable of caring for himself or managing his property or incapable of discerning or appreciating the motives or designs of any person or persons with whom he came in contact, or incapable of comprehending or understanding any of the written instruments, trusts, requests, or agreements mentioned in said amended bill.

3. Answering the third paragraph of said amended bill, this defendant admits that said Jackson Barnett is a full-blood member of the Muskogee or Creek Tribe of Indians, enrolled opposite number 4254 of the approved Creek roll, and as such was entitled to an allotment of land in the Indian Territory, and that there was allotted to him the property described in said paragraph third of the
47 amended bill; but this defendant states that it is without knowledge as to whether said Jackson Barnett failed to make any selection of allotment, or, if so, the reasons for said failure, or whether said premises were arbitrarily allotted to him.

4. This defendant states that it is advised that it is not called upon to make answer to paragraph fourth of said amended bill, the same containing mere conclusions of law.

5. Answering the fifth paragraph of said amended bill, this defendant states that it is without knowledge whether plaintiff was duly adjudged to be mentally incompetent by the County Court of Okmulgee County, Oklahoma, on or about April 29th, 1912, or at any of the times mentioned in said amended bill, or whether said court then, or at any of the times mentioned in said amended bill, had jurisdiction of either plaintiff's person or estate, or whether said county was at that time the place of residence of plaintiff, or whether said proceedings mentioned in said paragraph were had pursuant to the acts of Congress or the laws of the State of Oklahoma referred to in paragraph fourth of said amended bill, or whether on or about April 29th, 1912, or at any of the times mentioned in said amended bill, a guardian of the person or estate of plaintiff was appointed by the said County Court of Okmulgee County, or whether the guardian, if any, so appointed thereupon duly qualified or acted as such until the 13th June, 1923, or on said date or at any other time, resigned, or whether Elmer S. Bailey was thereupon appointed as the successor of said guardian, or
48 whether said Elmer S. Bailey duly qualified as such guardian or assumed the duties thereof, or whether then or at any time since he has acted or is now acting in such capacity, and therefore holds plaintiff to strict proof of all thereof.

6. Answering the sixth paragraph of said amended bill, this defendant states that it is without knowledge whether at all times prior to October 19th, 1922, the Secretary of the Interior of the United States had construed the acts of Congress as conferring jurisdiction of the estate of minor and incompetent Indians upon the County Courts of Oklahoma, or had recognized the jurisdiction of such courts by the rules and regulations of his department set forth in said paragraph of the amended bill.

7. Answering paragraph seventh of said amended bill, this defendant states that it is without knowledge whether at all times prior to the transactions complained of in said amended bill or at any other time plaintiff was recognized as a mental incompetent and Carl J. O'Hornett as his legal guardian by the Secretary of the Interior, the Commissioner of Indian Affairs, the Superintendent

of the Five Civilized Tribes, and by all other officers and branches of the Department of the Interior with whom plaintiff came in contact, or as to what, if any, sums of money held for plaintiff were paid by the Department of the Interior to said Carl J. O'Hornett for the use or benefit of plaintiff upon orders of the County Court of said Okmulgee County, or whether any part of plaintiff's funds
49 held by the Department of the Interior were paid out by the latter other than to or through said O'Hornett upon order of said county court.

8. Answering the eighth paragraph of said amended bill. this defendant admits that on or about August 22nd, 1912, Carl J. O'Hornett, purporting to act as guardian for plaintiff, joined in a certain lease contract by plaintiff to H. U. Bartlett whereby there was leased to said Bartlett the premises described in said bill for a period of ten years from the date of the approval thereof by the Secretary of the Interior and as much longer thereafter as oil or gas should be found in paying quantities, and that a copy of said lease marked " Exhibit A" is attached to said amended bill; but this defendant states that it is without knowledge whether said O'Hornett had theretofore been duly appointed as guardian of plaintiff or whether said O'Hornett was then acting as such guardian.

9. Answering the ninth and tenth paragraphs of said amended bill, this defendant admits the allegations therein contained.

10. Answering the eleventh paragraph of said amended bill, this defendant denies that in January, 1920, or at any other time mentioned in said amended bill, plaintiff was incompetent; and it admits each and every other allegation of said amended bill contained in said paragraph.

11. Answering the twelfth paragraph of said amended bill, this defendant admits that prior to January, 1920, a number of articles had been published in various newspapers throughout the United States concerning plaintiff and his wealth, but this defendant
50 states that it is without knowledge as to whether plaintiff had become reputed to be the richest Indian in the world.

12. Answering the thirteenth paragraph of said amended bill, this defendant denies that at any time therein mentioned plaintiff was incompetent, and it states that it is without knowledge in respect to all of the other matters set forth in said paragraph.

13. Answering the fourteenth paragraph of said amended bill, this defendant denies that at any time therein mentioned plaintiff was incompetent, or an imbecile, or incapable of understanding the nature of a marriage contract or incapable of entering into a valid marriage; and defendant states that it is without knowledge in respect to all of the other matters set forth in said paragraph.

14. Answering the fifteenth paragraph of said amended bill, this defendant denies that at any time therein mentioned plaintiff was incompetent; and it states that it is without knowledge in respect to all of the other matters set forth in said paragraph.

15. Answering the sixteenth paragraph of said amended bill, this defendant denies that at any time therein mentioned plaintiff was incompetent, and it states that it is without knowledge in respect to all of the other matters set forth in said paragraph.

16. Answering the seventeenth paragraph of said amended
51 bill, this defendant denies that at any time therein mentioned plaintiff was incompetent, and it states that it is without knowledge in respect to all of the other matters set forth in said paragraph.

17. Answering the eighteenth paragraph of said amended bill, this defendant admits that prior to December 15th, 1922, there had accumulated in the hands of the Superintendent for the Five Civilized Tribes, for the use and benefit of plaintiff, from royalties from oil and gas from his allotment as aforesaid, a sum in excess of $1,100,000, which funds had been transferred by said superintendent to the Secretary of the Interior and invested by the latter in United States Liberty loan bonds or had been invested in said bonds by the said superintendent and said bonds forwarded to the Secretary of the Interior; but this defendant denies that either the said accumulation of said moneys, or the said investment thereof, or the said transfer of said bonds was without authority of law.

18. Answering the nineteenth paragraph of said amended bill, this defendant admits the allegations therein contained.

19. Answering the twentieth paragraph of said amended bill, this defendant states that it is without knowledge as to whether at some time prior to December, 1922, or at any other time, Anna Laura Barnett, Harold C. McGougin, A. J. Ward, or any other persons entered into a conspiracy for the purpose of extracting from plaintiff's estate a large sum of money, or whether for the pur-
52 pose of carrying out said alleged conspiracy said McGougin and Ward went to Washington, D. C., in October or November, 1922, or whether they there negotiated with the Commissioner of Indian Affairs, Charles H. Burke, or the then Secretary of the Interior, Albert B. Fall, or one of the latter's assistants, or whether arrangements were made between said McGougin, Ward, the Commissioner of Indian Affairs, and an Assistant Secretary of the Interior whereby United States Liberty loan bonds of the par value of $550,000 then held by the Secretary of the Interior for plaintiff should be delivered to Anna Laura Barnett and whereby other United States Liberty loan bonds of plaintiff of the par value of $550,000 should be delivered to this defendant under the trust agreement, of which a copy is hereto annexed, marked "Exhibit A," or whether said Anna Laura Barnett was requested to take plaintiff to Washington, D. C., for the purpose of carrying out said disbursement of the funds of plaintiff, or whether said Anna Laura Barnett took plaintiff to Washington, D. C., or whether she induced plaintiff to place his thumb mark on the communication addressed to the Secretary of the Interior through the Commissioner of Indian Affairs, a copy of which is attached to said amended bill marked "Exhibit

B." This defendant admits that said communication was prepared by A. J. Ward, but states that it is without knowledge as to whether it was prepared for the purpose of carrying out any previous alleged designs of said Anna Laura Barnett to acquire possession or control of plaintiff's estate, or as to whether the provisions for the trust fund in favor of this defendant was therein inserted for
53 the purpose of giving color of philanthropy to said transactions; but this defendant denies that plaintiff had no part in the negotiations for the said distribution of his estate, or that plaintiff had no knowledge of the proposed distribution, or that plaintiff had never heard of the defendant The American Baptist Home Mission Society, or that plaintiff had no desire or intention and was incapable of forming any desire or intention to distribute the estate in the manner set forth in said amended bill, or that plaintiff was incapable of understanding or comprehending the nature, extent, purpose, and effect of such distribution, or that said communication to the Secretary of the Interior was not read to or explained to plaintiff, or that plaintiff could not have understood or comprehended the meaning, nature, or extent of the same nor of the proposed distribution of his estate, or that said communication was not the act of plaintiff, or that it was the act and will of said Anna Laura Barnett and her other alleged co-conspirators or any of them. This defendant further denies that plaintiff's thumb mark was affixed to said instrument solely through the alleged domination of said Anna Laura Barnett; and this defendant states that it is without knowledge whether at the time plaintiff affixed his said thumb mark to said instrument said Anna Laura Barnett was present and surrounded by her counsel and alleged co-conspirators, or whether plaintiff did not have the benefit of counsel to represent and advise him, or as to whether the alleged negotiations for said distribution were pending for several months, or as to whether all knowledge of the same was kept from the person purport-
54 ing then to act as plaintiff's guardian or from the plaintiff's attorney, relatives, and friends in Oklahoma and from the County Court of Okmulgee County, Oklahoma, and from the United States probate attorney claiming to have jurisdiction in Okmulgee County, Oklahoma, and from the office of the Attorney General of the United States or from any of them.

20. Answering the twenty-first paragraph of said amended bill, this defendant admits the allegations therein contained.

21. Answering the twenty-second paragraph of said amended bill, this defendant admits that on or about February 1st, 1923, there were delivered to Anna Laura Barnett, the wife of plaintiff, United States Liberty loan bonds having a par value of $550,000, being part of the bonds held by the Secretary of the Interior for the use and benefit of plaintiff, and that the same were so delivered pursuant to an instrument of gift, of which a copy marked "Exhibit B" is annexed to said amended bill, and that said bonds to the extent of the par value of $200,000 were delivered by said Anna Laura Bar-

sent to the Riggs National Bank of Washington, D. C., under a certain trust agreement between her and said bank; and this defendant states that it is without knowledge as to what was done by said Anna Laura Barnett with the balance of said bonds.

22. Answering the twenty-third paragraph of said amended bill, this defendant admits that on or about February 1st, 1923, there were delivered to the defendant, The American Baptist Home Mission Society, United States Liberty loan bonds having a par value of $550,000, being part of the bonds held by the Secretary of the Interior for the use and benefit of plaintiff, to be by that defendant delivered to this defendant under a trust agreement to be approved by the Secretary of the Interior, and thereafter the defendant, The American Baptist Home Mission Society, duly delivered said bonds to this defendant under a trust agreement approved by the Secretary of the Interior, a copy of which is annexed hereto and marked "Exhibit A," and that said bonds have been at all times since then and now are held by this defendant under the provisions of said trust agreement, and that said bonds were so delivered pursuant to said instrument of gift, of which a copy, marked "Exhibit B," is annexed to said amended bill.

23. This defendant states that it is advised that it is not called upon to make answer to paragraphs twenty-fourth, twenty-fifth, and twenty-sixth of said amended bill, the same containing mere conclusions of law.

24. Answering the twenty-seventh paragraph of said amended bill, this defendant denies that the approval of the Secretary of the Interior of the distribution of said funds or property of plaintiff was procured by any misrepresentation of facts made in said instrument of gift, of which a copy, marked "Exhibit B," is annexed to said amended bill; and it also denies that said instrument was written at the instance of Anna Laura Barnett or by her employees or co-conspirators; and this defendant further denies that the statements contained in said instrument that plaintiff had no living relatives or kindred who, either by ties or blood or by their conduct towards plaintiff were entitled to any part of his estate or to any consideration from him whatsoever, or that no living relative prior to the time plaintiff became wealthy manifested any interest in him, or that said Anna Laura Barnett was a faithful and loving wife, or that she had shown plaintiff every consideration, or any of such statements was false or fraudulently made; and this defendant states that it is without knowledge as to whether at the time said instrument was executed plaintiff had and still has living a half-brother, one David Barnett, or whether said David Barnett prior to the time when plaintiff became wealthy lived with plaintiff or cared for or provided for him until plaintiff was able to purchase a home of his own and to provide servants for his care, or as to whether Anna Laura Barnett has since her marriage to plaintiff kept him in virtual captivity or has refused to permit him to see or communicate with the person claiming to be his guardian, his

friends, relatives, or members of his tribe, or any of them, or as to whether the affection or pretended affection bestowed upon plaintiff by said Anna Laura Barnett was for the sole purpose of extracting a large sum of money from his estate.

25. Answering the twenty-eighth paragraph of said amended bill, this defendant states that it is without knowledge as to whether M. L. Mott was a friend of Commissioner Charles H. Burke or whether said M. L. Mott was employed on behalf of Anna Laura Barnett in connection with the securing by her of said Liberty bonds, or if
57 he was so employed, the reasons therefor, or whether through his participation and influence, if any, said Commissioner of Indian Affairs was induced to accept as true and correct the statements set forth in said instrument of gift, and recommend the same for approval; and this defendant denies that the said statements or any of them were false.

26. Answering the twenty-ninth paragraph of said amended bill, this defendant admits that after the marriage of Anna Laura Barnett to plaintiff an investigation of the former's past life was caused to be made by the Department of the Interior by Secret Service agents, and that such agents made a detailed report to the Deparment of the Interior, but this defendant states that it is without knowledge as to the contents of said report; and this defendant denies that the Commissioner of Indian Affairs in recommending for approval the distribution of the said $1,100,000 Liberty loan bonds forming a part of plaintiff's estate abused his discretion, and it also denies that the approval of the Secretary of the Interior to said distribution was procured either by fraud, imposition, dec'it, or misrepresentation.

27. Answering the thirtieth paragraph of said amended bill, this defendant states that it is without knowledge as to whether the Commissioner of Indian Affairs or the Secretary of the Interior have, since said distribution of said bonds, been fully advised of all the alleged circumstances surrounding the same, or as to whether the Commissioner of Indian Affairs or the Secretary of Interior are actively co-operating with and assisting said Anna
58 Laura Barnett to establish the validity of said distribution or to prevent the recovery thereof by plaintiff.

28. Answering the thirty-first paragraph of said amended bill, this defendant admits the allegations thereof.

29. Answering the thirty-second paragraph of said amended bill, this defendant admits that it has collected a large amount of interest from said bonds and that the same is still in the possession of said defendant, and that the exact amount thereof is unknown to plaintiff or to any person purporting to act as plaintiff's guardian or next friend; but it denies that said interest or any part thereof has been unlawfully disposed of in violation of plaintiff's rights of which the defendants had due notice or otherwise, and states that all of said interest is still held by said defendant.

30. Answering the thirty-third paragraph of said amended bill, this defendant admits that it and defendant The American Baptist

Home Mission Society each knew at the times they respectively received said bonds that plaintiff was the owner thereof, subject to the qualifications, limitations, and restrictions imposed upon his said ownership thereof by law and the regulations prescribed by the Secretary of the Interior in respect to restricted property of restricted Indians; but it denies that either it or defendant The American Baptist Home Mission Society then knew that plaintiff was incompetent or that a guardian of the person or estate of plaintiff had
59 been appointed by the County Court of Okmulgee County, Oklahoma, and also denies that plaintiff was then mentally incompetent; and this defendant states that it is without knowledge whether a guardian of plaintiff's person or estate had been at that time or at any other time duly appointed by said court, or whether any person so appointed was still the duly appointed, qualified, and acting guardian of the person and estate of plaintiff.

31. Answering the thirty-fourth paragraph of said amended bill, this defendant admits that both it and defendant The American Baptist Home Mission Society have failed and refused to account for to plaintiff or to pay over to him said $550,000 par value of said bonds or the proceeds or interest or income thereof; but it denies that any such accounting or payment has been demanded.

32. Answering the thirty-fifth paragraph of said amended bill, this defendant denies the same.

And this defendant further says as a separate and distinct defense to the amended bill of complaint:

33. The plaintiff is a full-blood member of the Muskogee or Creek Tribe or Nation of Indians, which is one of the Five Civilized Tribes, and he is and at all times hereinafter mentioned was a so-called "restricted Indian," and as such was and is, under the Constitution and laws of the United States, both as to his person and property, under the special charge, control, and protection of the Secretary of the Interior of the United States; that prior to February 1, 1923, the plaintiff, as a member of the Creek or Muskogee Tribe or Na-
60 tion of Indians, was duly allotted and received as his distribution portion, or share of the lands of the Creek Nation certain property in Creek County, Oklahoma, described as the southeast quarter of section five (5), township seventeen (17), range 7 east; that under the laws of the United States said land was restricted land; and that thereafter said land was duly leased for oil and gas purposes and, pursuant to the terms and conditions of the agreement under which said land was leased, sums of money were from time to time duly paid to the Secretary of the Interior on account of royalties and bonuses payable under said lease, which said sums of money were restricted funds in the hands of the Secretary of the Interior; that thereafter out of said sums of money the Secretary of the Interior, pursuant to authority conferred upon him by the laws of the United States, duly purchased the $550,000 principal amount

of Liberty loan bonds referred to in said amended bill; that on or about February 1, 1923, the Secretary of the Interior, at the request and with the knowledge and consent of the plaintiff and pursuant to authority conferred upon him by the laws of the United States, duly delivered to the defendant The American Baptist Home Mission Society the $550,000 principal amount of Liberty loan bonds referred to in said amended bill, to be by it delivered to this defendant under a trust agreement to be approved by the Secretary of the Interior, and thereafter the defendant The American Baptist Home Mission Society duly delivered said bonds to this defendant under a trust agreement approved by the Secretary of the Interior, a copy of which is annexed hereto and marked "Exhibit A," and that they have been and at all times since then and now are held by this defend-
61 ant under the provisions of said trust agreement; that by the execution of said trust agreement and the delivery of said bonds as aforesaid, a valid trust was created upon the terms and conditions set forth in said trust agreement and the same is now in all respects a valid trust and this defendant holds said $550,000 principal amount of Liberty loan bonds for the uses and purposes set forth in said trust agreement. That the Secretary of the Interior as a further condition of said transaction in respect to said bonds required the defendant The American Baptist Home Mission Society to execute and deliver to him a certain declaration of trust, of which a copy is hereto annexed and marked "Exhibit B." That neither the plaintiff nor any person claiming by, through, or under him, or representing him as guardian or committee or otherwise, has any right to question or attack in any way the validity of said trust created by the execution of said trust agreement and the delivery of said bonds to this defendant as aforesaid, or the validity or conclusiveness of the acts of the Secretary of the Interior in connection therewith, and that none of the acts of the Secretary of the Interior in connection therewith, and that none of the acts of the Secretary of the Interior as aforesaid, is subject to review by this or any other court.

Wherefore this defendant prays that said amended bill be dismissed and for judgment for its costs in this behalf incurred.

MURRAY, ALDRICH & ROBERTS,
Solicitors for the Defendant
The Equitable Trust Company of New York,
37 Wall Street, New York, N. Y.

62 *Exhibit A to answer of Equitable Trust Co.*

Agreement made this 1st day of February, in the year nineteen hundred and twenty-three, between The American Baptist Home Mission Society, incorporated by a special act of the Legislature of the State of New York, party of the first part, and the Equitable

Trust Company of the city of New York, party of the second part, witnesseth:

First. That in consideration of the covenants and agreements on the part of the party of the second part, hereinafter set forth, the party of the first part deposits with the party of the second part Liberty loan bonds of the United States to the amount of five hundred and fifty thousand dollars ($550,000), the receipt whereof by the party of the second part is hereby acknowledged, in trust, nevertheless, for the uses and purposes hereinafter set forth.

Second. That the party of the second part receives the said bonds under the agreement and it hereby agrees that it will take and hold said bonds and the proceeds thereof and that it will collect and receive the income thereon and therefrom, and will pay the net annual income therefrom during the life of Jackson Barnett, of Coffeyville, Montgomery County, Kansas, in quarterly instalments on the first day of April, July, October, and January, as nearly equal as may be, as follows:

(a) So long as said Jackson Barnett shall be a restricted Indian under the laws of the United States said net income in an amount not to exceed $20,000 in any one year, to the Superintendent for
63 the Five Civilized Tribes, or to his successor in office, at Muskogee, Muskogee County, Oklahoma. Every such payment shall be accompanied by a letter stating that the same is for the benefit of said Jackson Barnett; but it shall in no event be any part of the duty of the said party of the second part to see to the application thereof by said superintendent or his successor in office.

(b) Upon the removal of said restrictions from said Jackson Barnett and his property, said net income in an amount not to exceed $20,000 in any one year, to said Jackson Barnett by mailing to him personally drafts payable at his place of residence or as near thereto as banking facilities may permit, irrespective of whether any guardian or other custodian of the property of said Jackson Barnett shall have been appointed.

(c) The excess, if any, of said net income collected and received about $20,000 in any one year, to the party of the first part. (It is the intention of the party of the first part that said excess, if any, shall be used by it for the benefit of Indian University located at Bacone, Oklahoma, and known generally as Bacone College, and also for the benefit of Murrow Indian Orphans' Home located at said Bacone; but it shall in no event be any part of the duty of the said party of the second part to see to the application thereof by said party of the first part.)

Third. That the payments of said instalments pursuant to
64 the terms hereof to the Superintendent for the Five Civilized Tribes, or his successor in office, or the said Jackson Barnett, as the case may be, are to be made regardless of any appointment of any guardian or custodian of either the person or the property of said Jackson Barnett, it being the intention of this agreement that

the one who shall receive pursuant to the terms hereof the moneys payable under this agreement, whether the said superintendent or his successor in office or the said Barnett, shall have the sole right to receive, handle, and control said moneys without the interference or interposition of any other official or of any other person whatsoever.

Fourth. That said Jackson Barnett shall not have the power to assign the whole or any part of the income payable to the said superintendent or his successor in office or to said Barnett under this agreement, and that any such assignment shall be void and ineffective to transfer any such interest or right and shall be disregarded by the two parties to this agreement, and shall not have the effect to delay or suspend any payment to the said superintendent or his successor in office or the said Barnett, as hereinbefore provided.

Fifth. The party of the second part shall have the right to present for redemption as they mature or to sell the said Liberty bonds in its discretion and to invest and keep invested the proceeds thereof in securities authorized by law for the investment of trust funds by the law of the State of New York, and to pay over the income from such reinvestments in the same manner as hereinbefore provided in the case of the income from said bonds.

65 Sixth. This agreement shall cease and come to an end upon the death of said Jackson Barnett and thereupon the party of the second part shall deliver to the party of the first part the securities or the proceeds of any securities held by the party of the second part under this agreement and any income on said trust fund which may have accrued subsequent to the date of the death of said Jackson Barnett; and shall deliver to the executor or administrator of said Jackson Barnett as part of his estate any income from said trust fund which may have accrued prior to the death of said Jackson Barnett.

Seventh. It shall be the duty of the several persons to whom the trustee is directed to pay the net income or principal of said trust fund hereby created to notify the trustee of the happening of the event or events by reason of which they may respectively become entitled to receive any such payment and to furnish reasonable proof to the trustee of the happening of any such event or events, and any payment, whether of income or principal, made in good faith by the trustee in the absence of such notice and such satisfactory proof until received, or in reliance upon such notice and such satisfactory proof when received, shall be deemed to have been made in the lawful execution of the trusts hereby created. The receipts of the several persons to whom the trustee is directed to pay the net income or the principal of the trust fund hereby created shall be, as against all persons, an absolute discharge and acquittance of the trustee as to the amounts and property covered thereby.

Eighth. That the trustee, in addition to its lawful ex-
66 penses and disbursements, including counsel fees, shall receive as compensation for its services herein the fees and

commissions allowed for testamentary trustees under the laws of the State of New York, and it is hereby authorized to deduct said amounts, respectively, from the income and from the principal before paying over the same to any person or persons entitled thereto by the provisions of this indenture.

Ninth. This agreement shall not be binding or of any effect until the Secretary of the Interior of the United States or an Assistant Secretary of the Interior of the United States shall have endorsed his approval hereon.

In witness whereof each of the parties hereto have caused its corporate seal to be affixed and these presents to be signed by its duly authorized officer, on the day and year first above written.

[SEAL.] THE AMERICAN BAPTIST HOME MISSION SOCIETY,
By CHARLES L. WHITE, *Executive Secretary.*

As to the American Baptist Home Mission Society:
SAMUEL BRYANT.

[SEAL.] THE EQUITABLE TRUST COMPANY OF NEW YORK,
By J. N. BABCOCK, *Vice President.*

As to the Equitable Trust Company of New York. Attest:
A. D. SNYDER, *Secy.*

Executed in triplicate.

67 STATE OF NEW YORK,
County of New York, ss:

On this 2nd day of February, in the year 1923, before me personally came Charles L. White, to me known, who, being duly sworn, did depose and say that he resides in New York City, N. Y., that he is the executive secretary of the American Baptist Home Mission Society, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to this instrument is such corporate seal; that it was so affixed by order of the board of managers of said corporation, and that he signed his name thereto by like order.

[SEAL.] MAUDE S. DEAN,
Notary Public, N. Y. County.

New York County Clk.'s No. 52.
New York Register's No. 4066.
Commission expires March 30, 1924.

68 STATE OF NEW YORK,
County of New York, ss:

On this 2nd day of February, in the year 1923, before me personally came J. N. Babcock, to me known, who, being duly sworn, did depose and say that he resides in New York City, N. Y., that he is a vice president of the Equitable Trust Company of New York, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to

this instrument is such corporate seal; that it was so affixed by order of the board of trustees of said corporation, and that he signed his name thereto by like order.

[SEAL.]

A. H. BROWN,
Notary Public, New York County.

New York County Clk.'s No. 312.
New York Register's No. 4084.
Commission expires March 30th, 1924.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., February 5, 1923.

Approved.

F. M. GOODWIN,
Assistant Secretary of the Interior.

69 *Exhibit B to answer of Equitable Trust Co.*

This declaration made this 1st day of February, in the year nineteen hundred*ed* and twenty-three, by the American Baptist Home Mission Society, incorporated by a special act of the Legislature of the State of New York, hereinafter called the society; whereas:

First. It appears by a certain agreement in writing bearing even date herewith between the society and the Equitable Trust Company of New York, hereinafter called the trust company, that—

1. The society has received as the property of one Jackson Barnett, of Coffeyville, Montgomery County, Kansas, and with his consent and at his request has in consideration of the covenants and agreements hereinafter set forth on the part of the said trust company, deposited with said trust company Liberty loan bonds of the United States to the amount of five hundred and fifty thousand dollars ($550,000), in trust, nevertheless, for the uses and purposes hereinafter set forth.

2. The said trust company received the said bonds under the agreement that it would take and hold said bonds and the proceeds thereof and that it will collect the income from said bonds or proceeds, and will pay to said Jackson Barnett twenty thousand ($20,000) annually from said income, in equal quarterly instalments, payable on the first day of April, July, October, and January in each year, by drafts payable to the order of the Superintendent for the Five Civi-
70 lized Tribes at Muskogee County, Oklahoma, the said payments to the said superintendent to continue so long as the said Jackson Barnett shall live and shall be a restricted Indian under the laws of the United States, and that said trust company will pay said instalments to said Jackson Barnett personally so long as he shall live after the restrictions imposed upon him and his property by law shall be removed, and in that event will make the payments to him by drafts payable at his place of residence or as near thereto as banking facilities may permit.

3. The payments of said instalments to the Superintendent for the Five Civilized Tribes or to said Jackson Barnett, as the case may be and as hereinbefore provided, will be made regardless of any appointment of any guardian of either the person or the property of said Jackson Barnett, it being the intention of said agreement that the one who shall receive the moneys payable thereunder, whether the said superintendent or the said Barnett, shall have the sole right to receive, handle, and control said moneys without the interference or interposition of any official other than the said superintendent or any person other than the said Barnett.

4. The said Jackson Barnett shall not have the power to assign the whole or any part of the income payable to the said superintendent or to said Barnett under said agreement or to assign any interest or right under said agreement, and that any such assignment shall be void and ineffective to transfer any such interest or right and shall be disregarded by the two parties to said agreement, and shall not have the effect to delay or to suspend any payment
71 to the said superintendent or the said Barnett as therein provided.

5. The said trust company will pay any net income in excess of said sum of twenty thousand dollars ($20,000) received from said bonds or from the proceeds thereof or from any securities in which said proceeds may be invested, to the said society to be used by it for the benefit of Indian University located at Bacone, Oklahoma, and known generally as Bacone University, and also for the benefit of Murrow Indian Orphans' Home located at said Bacone.

6. The said trust company shall have the right to present for redemption as they mature or to sell the said Liberty loan bonds in its discretion and the proceeds thereof to invest and to keep invested and the income therefrom to pay as provided in the case of the income from said bonds.

7. The said agreement shall cease and come to an end upon the death of said Jackson Barnett, and thereupon the said trust company shall deliver to the said society the securities or the proceeds of any securities held by the trust company under said agreement and will also pay to said society any collected income therefrom.

8. For its services under said agreement the said trust company in addition to its lawful expenses and disbursements, including counsel fees, shall receive as compensation for its services the fees and commissions allowed to testamentary trustees under the laws of the State of New York.

72 9. Said agreement shall be subject to the approval of the Secretary of the Interior, to be evidenced by his signature.

Now, therefore, this declaration witnesseth:

First. That the said The American Baptist Home Mission Society hereby declares that the facts and that the terms of the agreement between it and the Equitable Trust Company of the city of New York hereinbefore set forth are in all respects correctly stated.

Second. That any income received during the lifetime of said Jackson Barnett by the society from said trust company under the terms of said agreement will be received by the society in trust and will be used by it for the benefit of Indian University located at Bacone, Oklahoma, and known generally as Bacone University, and also for the benefit of Murrow Indian Orphans' Home located at said Bacone.

Third. That any securities or the proceeds of any securities or the proceeds of said securities so received, or any income received by said society from said trust company under the terms of said agreement will be received by the society in trust, and that said securities and the proceeds of any securities will be held in trust by it and that said proceeds will be invested and will be kept invested, and that the net income therefrom and any income received by said society from said trust company will be used by the society
73 for the benefit of said Indian University and said Murrow Indian Orphans' Home.

In witness whereof the said society has hereunto caused its corporate seal to be affixed and these presents to be signed by its executive secretary and its treasurer on the day and year first above written.

In the presence of:

THE AMERICAN BAPTIST HOME MISSION SOCIETY,
By CHARLES L. WHITE, *Executive Secretary*,
SAMUEL BRYANT, *Treasurer*.

74 STATE OF NEW YORK,
County of New York, ss:

On this 2nd day of February, 1923, before me personally came Charles L. White and Samuel Bryant, to me known, and who being by me severally duly sworn, did depose and say that said Charles L. White resides in the city of New York; and that said Samuel Bryant resides in Palisades Park, New Jersey; that said Charles L. White is the executive secretary and that said Samuel Bryant is the treasurer of The American Baptist Home Mission Society, the corporation described in and which executed the foregoing instrument; that they knew the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of managers of said corporation, and that they signed their names thereto by like order.

MAUDE S. DEAN,
Notary Public, New York County.

New York County Clk.'s No. 32.
New York Register's No. 4065.
Commission expires March 30th, 1924.

75 IN UNITED STATES DISTRICT COURT

[Title omitted.]

Answer of the American Baptist Home Mission Society

The answer of the defendant The American Baptist Home Mission Society to the amended bill of complaint filed herein respectfully shows to the court as follows:

1. Answering the first paragraph of said amended bill, this defendant states that it is without knowledge whether Elmer S. Bailey, referred to therein, is a citizen of Oklahoma, or whether plaintiff is a citizen of Oklahoma or of any other State, and is therefore without knowledge whether this suit presents a controversy wholly between citizens of different States, and is without knowledge whether said Elmer S. Bailey has any authority or right to sue as prochein ami of plaintiff, and therefore holds plaintiff to strict proof of all thereof; but admits that each of the defendants
76 is a corporation organized and existing under the laws of the State of New York and a citizen of said State, having its principal business office in, and being an inhabitant of, the Southern District of New York.

2. Answering the second paragraph of said amended bill, this defendant states that it is without knowledge of the age of said Jackson Barnett; it admits that he is and was at all the times mentioned in said amended bill uneducated and unable to read or write, but it denies that said Jackson Barnett now is or at any of the times mentioned in said amended bill was an imbecile, ignorant or incapable of understanding or comprehending the value, condition, character, nature or extent of his estate or any part thereof, or incapable of caring for himself or managing his property or incapable of discerning or appreciating the motives or designs of any person or persons with whom he came in contact, or incapable of comprehending or understanding any of the written instruments, trusts, requests, or agreements mentioned in said amended bill.

3. Answering the third paragraph of said amended bill, this defendant admits that said Jackson Barnett is a full-blood member of the Muskogee or Creek Tribe of Indians, enrolled opposed number 4254 of the Approved Creek Roll, and as such was entitled to an allotment of land in the Indian Territory, and that there was allotted to him the property described in said paragraph third of
77 the amended bill; but this defendant states that it is without knowledge as to whether said Jackson Barnett failed to make any selection of allotment, or, if so, the reasons for said failure, or whether said premises were arbitrarily allotted to him.

4. This defendant states that it is advised that it is not called upon to make answer to paragraph fourth of said amended bill, the same containing mere conclusions of law.

5. Answering the fifth paragraph of said amended bill, this defendant states that it is without knowledge whether plaintiff was

duly adjudged to be mentally incompetent by the County Court of Okmulgee County, Oklahoma, on or about April 29th, 1912, or at any of the times mentioned in said amended bill, or whether said court then, or at any of the times mentioned in said amended bill, had jurisdiction of either plaintiff's person or estate, or whether said county was at that time the place of residence of plaintiff, or whether said proceedings mentioned in said paragraph were had pursuant to the acts of Congress or the laws of the State of Oklahoma referred to in paragraph fourth of said amended bill, or whether on or about April 29th, 1912, or at any of the times mentioned in said amended bill, a guardian of the person or estate of plaintiff was appointed by the said County Court of Okmulgee County, or whether the guardian, if any, so appointed thereupon duly qualified or acted as such until the 13th June, 1923, or, on said date or at any other time, resigned, or whether Elmer S. Bailey was thereupon
78 appointed as the successor of said guardian, or whether said Elmer S. Bailey duly qualified as such guardian or assumed the duties thereof, or whether then or at any time since he has acted or is now acting in such capacity, and therefore holds himself to strict proof of all thereof.

6. Answering the sixth paragraph of said amended bill, this defendant states that it is without knowledge whether at all times prior to October 19th, 1922, the Secretary of the Interior of the United States had construed the acts of Congress as conferring jurisdiction of the estates of minor and incompetent Indians upon the County Courts of Oklahoma, or had recognized the jurisdiction of such courts by the rules and regulations of his department set forth in said paragraph of the amended bill.

7. Answering paragraph seventh of said amended bill, this defendant states that it is without knowledge whether at all times prior to the transactions complained of in said amended bill or at any other time plaintiff was recognized as a mental incompetent and Carl J. O'Hornett as his legal guardian by the Secretary of the Interior, the Commissioner of Indian Affairs, the Superintendent of the Five Civilized Tribes and by all other officers and branches of the Department of the Interior with whom plaintiff came in contact, or as to what, if any, sums of money held for plaintiff were paid by the Department of the Interior to said Carl J. O'Hornett for the use or benefit of plaintiff upon orders of the County Court of said
79 Okmulgee County, or whether any part of plaintiff's funds held by the Department of the Interior were paid out by the latter other than to or through said O'Hornett, upon order of said County Court.

8. Answering the eighth paragraph of said amended bill, this defendant admits that on or about August 22nd, 1912, Carl J. O'Hornett, purporting to act as guardian for plaintiff, joined in a certain lease contract by plaintiff to H. U. Bartlett whereby there was leased to said Bartlett the premises described in said bill, for a period of ten years from the date of the approval thereof by the

Secretary of the Interior and as much longer thereafter as oil or gas should be found in paying quantities, and that a copy of said lease marked "Exhibit A" is attached to said amended bill; but this defendant states that it is without knowledge whether said O'Hornett had theretofore been duly appointed as guardian of plaintiff or whether said O'Hornett was then acting as such guardian.

9. Answering the ninth and tenth paragraphs of said amended bill, this defendant admits the allegations therein contained.

10. Answering the eleventh paragraph of said amended bill, this defendant denies that in January, 1920, or at any other time mentioned in said amended bill, plaintiff was incompetent; and it admits each and every other allegation of said amended bill contained in said paragraph.

11. Answering the twelfth paragraph of said amended bill,
60 this defendant admits that prior to January, 1920, a number of articles had been published in various newspapers throughout the United States concerning plaintiff and his wealth, but this defendant states that it is without knowledge as to whether plaintiff had become reputed to be the richest Indian in the world.

12. Answering the thirteenth paragraph of said amended bill, this defendant denies that at any time therein mentioned plaintiff was incompetent, and it states that it is without knowledge in respect to all of the other matters set forth in said paragraph.

13. Answering the fourteenth paragraph of said amended bill, this defendant denies that at any time therein mentioned plaintiff was incompetent, or an imbecile, or incapable of understanding the nature of a marriage contract or incapable of entering into a valid marriage; and defendant states that it is without knowledge in respect to all of the other matters set forth in said paragraph.

14. Answering the fifteenth paragraph of said amended bill, this defendant denies that at any time therein mentioned plaintiff was incompetent; and it states that it is without knowledge in respect to all of the other matters set forth in said paragraph.

15. Answering the sixteenth paragraph of said amended bill, this defendant denies that at any time therein mentioned plaintiff was incompetent, and it states that it is without knowledge in
61 respect to all of the other matters set forth in said paragraph.

16. Answering the seventeenth paragraph of said amended bill, this defendant denies that at any time therein mentioned plaintiff was incompetent, and it states that it is without knowledge in respect to all of the other matters set forth in said paragraph.

17. Answering the eighteenth paragraph of said amended bill, this defendant admits that prior to December 15th, 1922, there had accumulated in the hands of the Superintendent for the Five Civilized Tribes, for the use and benefit of plaintiff, from royalties from oil and gas from his allotment as aforesaid, a sum in excess of $1,100,000, which funds had been transferred by said superintendent to the Secretary of the Interior and invested by the latter in United

States Liberty loan bonds or had been invested in said bonds by the said superintendent and said bonds forwarded to the Secretary of the Interior; but this defendant denies that either the said accumulation of said moneys, or the said investment thereof, or the said transfer of said bonds with without authority of law.

18. Answering the nineteenth paragraph of said amended bill, this defendant admits the allegations therein contained.

19. Answering the twentieth paragraph of said amended bill, this defendant states that it is without knowledge as to whether at
82 some time prior to December, 1922, or at any other time, Anna Laura Barnett, Harold C. McGougin, A. J. Ward, or any other persons entered into a conspiracy for the purpose of extracting from plaintiff's estate a large sum of money or whether for the purpose of carrying out said alleged conspiracy said McGougin and Ward went to Washington, D. C., in October or November, 1922, or whether they there negotiated with the Commissioner of Indian Affairs, Charles H. Burke, or the then Secretary of the Interior, Albert B. Fall, or one of the latter's assistants, or whether arrangements were made between said McGougin, Ward, the Commissioner of Indian Affairs, and an Assistant Secretary of the Interior whereby United States Liberty loan bonds of the par value of $550,000 then held by the Secretary of the Interior for plaintiff should be delivered to Anna Laura Barnett and whereby other United States Liberty loan bonds of plaintiff of the par value of $550,000 should be delivered to this defendant under the trust agreement of which a copy is hereto annexed, marked "Exhibit A," or whether said Anna Laura Barnett was requested to take plaintiff to Washington, D. C., for the purpose of carrying out said disbursement of the funds of plaintiff, or whether said Anna Laura Barnett took plaintiff to Washington, D. C., or whether she induced plaintiff to place his thumb mark on the communication addressed to the Secretary of the Interior through the Commissioner of Indian Affairs, a copy of which is attached to said amended bill marked "Exhibit B." This defendant admits that said communication was prepared by
A. J. Ward, but states that it is without knowledge as to
83 whether it was prepared for the purpose of carrying out any previous alleged designs of said Anna Laura Barnett to acquire possession or control of plaintiffs' estate, or as to whether the provision for the trust fund in favor of this defendant was therein inserted for the purpose of giving a color of philanthropy to said transactions; but this defendant denies that plaintiff had no part in the negotiations for the said distribution of his estate, or that plaintiff had no knowledge of the proposed distribution, or that plaintiff had never heard of this defendant, or that plaintiff had no desire or intention and was incapable of forming any desire to distribute the estate in the manner set forth in said amended bill, or that plaintiff was incapable of understanding or comprehending the nature, extent, purpose and effect of such distribution, or that said communication to the Secretary of the Interior was not read to or explained to

plaintiff, or that plaintiff could not have understood or comprehended the meaning, nature or extent of the same nor of the proposed distribution of his estate, or that said communication was not the act of plaintiff, or that it was the act and will of said Anna Laura Barnett and her other alleged co-conspirators or any of them. This defendant further denies that plaintiff's thumb mark was affixed to said instrument solely through the alleged domination of said Anna Laura Barnett; and this defendant states that it is without knowledge whether at the time plaintiff affixed his said thumb mark to said instrument said Anna Laura Barnett was present and surrounded by her counsel and alleged co-conspirators, or whether
84 plaintiff did not have the benefit of counsel to represent and advise him, or as to whether the alleged negotiations for said distribution were pending for several months, or as to whether all knowledge of the same was kept from the person purporting then to act as plaintiff's guardian or from the plaintiff's attorney, relatives and friends in Oklahoma and from the County Court of Okmulgee County, Oklahoma, and from the United States probate attorney claiming to have jurisdiction in Okmulgee County, Oklahoma, and from the office of the Attorney General of the United States, or from any of them.

20. Answering the twenty-fifth paragraph of said amended bill, this defendant admits the allegations therein contained.

21. Answering the twenty-second paragraph of said amended bill, this defendant admits that on or about February 1st, 1923, there were delivered to Anna Laura Barnett, the wife of plaintiff, United States Liberty bonds having a par value of $550,000 being part of the bonds held by the S'cretary of the Interior for the use and benefit of plaintiff, and that the same were so delivered pursuant to an instrument of gift, of which a copy marked "Exhibit B" is annexed to said amended bill, and that said bonds to the extent of the par value of $200,000 were delivered by said Anna Laura Barnett to the Riggs National Bank, of Washington, D. C., under a certain trust agreement between her and said bank; and this defendant states that it is without knowledge as to what was done by said Anna Laura Barnett with the balance of said bonds.

85 22. Answering the twenty-third paragraph of said amended bill, this defendant admits that on or about February 1st, 1923, there were delivered to the defendant The American Baptist Home Mission Society United States Liberty loan bonds having a par value of $550,000, being part of the bonds held by the Secretary of the Interior for the use and benefit of plaintiff, to be by that defendant delivered to this defendant under a trust agreement to be approved by the Secretary of the Interior, and thereafter the defendant The American Baptist Home Mission Society duly delivered said bonds to this defendant under a trust agreement approved by the Secretary of the Interior, a copy of which is annexed hereto and marked "Exhibit A," and that said bonds have been at all times since then and now are held by defendant The Equitable Trust

Company of New York under the provisions of said trust agreement, and that said bonds were so delivered pursuant to said instrument of gift of which a copy marked "Exhibit B" is annexed to said amended bill.

23. This defendant states that it is advised that it is not called upon to make answer to paragraphs Twenty-fourth, Twenty-fifth, and Twenty-sixth of said amended bill, the same containing mere conclusions of law.

24. Answering the twenty-seventh paragraph of said amended bill, this defendant denies that the approval of the Secretary of the Interior of the distribution of said funds or property of plaintiff
86 was procured by any misrepresentation of facts made in said instrument of gift of which a copy, marked "Exhibit B," is annexed to said amended bill; and it also denies that said instrument was written at the instance of Anna Laura Barnett or by her employees or co-conspirators; and this defendant further denies that the statements contained in said instrument that plaitiff had no living relatives or kindred who, either by ties of blood or by their conduct towards plaintiff were entitled to any part of his estate or to any consideration from him whatsoever, or that no living relative prior to the time plaintiff became wealthy manifested any interest in him, or that said Anna Laura Barnett was a faithful and loving wife, or that she had shown plaintiff every consideration, or any of such statements was false or fraudulently made; and this defendant states that it is without knowledge as to whether at the time said instrument was executed plaintiff had and still has living a half-brother, one David Barnett, or whether said David Barnett prior to the time when plaintiff became wealthy lived with plaintiff or cared for or provided for him until plaintiff was able to purchase a home of his own and to provide servants for his care, or as to whether Anna Laura Barnett has since her marriage to plaintiff kept him in virtual captivity or has refused to permit him to see or communicate with the person claiming to be his guardian, his friends, relatives, or members of his tribe, or any of them, or as to whether the affection or pretended affection bestowed upon plaintiff by said Anna Laura Barnett was for the sole purpose of extracting a large sum of money from his estate.

87 25. Answering the twenty-eighth paragraph of said amended bill, this defendant states that it is without knowledge as to whether M. L. Mott was a friend of Commissioner Charles H. Burke or whether said M. L. Mott was employed on behalf of Anna Laura Barnett in connection with the securing by her of said Liberty bonds or if he was so employed, the reasons therefor, or whether through his participation and influence, if any, said Commissioner of Indian Affairs was induced to accept as true and correct the statements set forth in said instrument of gift, and recommend the same for approval; and this defendant denies that the said statements or any of them were false

26. Answering the twenty-ninth paragraph of said amended bill, this defendant admits that after the marriage of Anna Laura Barnett to plaintiff an investigation of the former's past life was caused to be made by the Department of the Interior by Secret Service agents, and that such agents made a detailed report to the Department of the Interior; but this defendant states that it is without knowledge as to the contents of said report; and this defendant denies that the Commissioner of Indian Affairs in recommending for approval the distribution of the said $1,100,000 Liberty loan bonds forming a part of plaintiff's estate abused his discretion, and its also denies that the approval of the Secretary of the Interior to said distribution was procured either by fraud, imposition, deceit, or misrepresentation.

27. Answering the thirtieth paragraph of said amended bill,
88 this defendant states that it is without knowledge as to whether the Commissioner of Indian Affairs or the Secretary of the Interior have, since said distribution of said bonds, been fully advised of all the alleged circumstances surrounding the same, or as to whether the Commissioner of Indian Affairs or the Secretary of the Interior are actively co-operating with and assisting said Anna Laura Barnett to establish the validity of said distribution to to prevent the recovery thereof by plaintiff.

28. Answering the thirty-first paragraph of said amended bill, this defendant admits the allegations thereof.

29. Answering the thirty-second paragraph of said amended bill, this defendant admits that defendant The Equitable Trust Company of New York has collected a large amount of interest from said bonds and that the same is still in the possession of said defendant, and that the exact amount thereof is unknown to plaintiff or to any person purporting to act as plaintiff's guardian or next friend; but it denies that said interest or any part thereof has been unlawfully disposed of in violation of plaintiff's rights of which the defendants had due notice or otherwise, and states that all of said interest is still held by said defendant.

30. Answering the thirty-third paragraph of said amended bill, this defendant admits that it and defendant The Equitable Trust Company of New York each knew at the times they respectively received said bonds that plaintiff was the owner thereof subject to
89 the qualifications, limitations, and restrictions imposed upon his said ownership thereof by law and the regulations prescribed by the Secretary of the Interior in respect to restricted property of restricted Indians; but it denies that either it or defendant The Equitable Trust Company of New York then knew that plaintiff was incompetent or that a guardian of the person or estate of plaintiff had been appointed by the county court of Okmulgee County, Oklahoma, and also denies that plaintiff was then mentally incompetent; and this defendant states that it is without knowledge whether a guardian of plaintiff's person or estate had been at that

time or at any other time duly appointed by said court, or whether any person so appointed was still the duly appointed, qualified, and acting guardian of the person and estate of plaintiff.

31. Answering the thirty-fourth paragraph of said amended bill, this defendant admits that both it and defendant The Equitable Trust Company of New York have failed and refused to account for to plaintiff or to pay over to him said $550,000 par value of said bonds or the proceeds or interest or income thereof; but it denies that any such accounting or payment has been demanded.

32. Answering the thirty-fifth paragraph of said amended bill, this defendant denies the same.

And this defendant further says as a separate and distinct defense to the amended bill of complaint:

33. The plaintiff is a full-blood member of the Muskogee or Creek Tribe or Nation of Indians, which is one of the Five
90 Civilized Tribes, and he is and at all times hereinafter mentioned was a so-called "restricted Indian," and as such was and is under the Constitution and laws of the United States, both as to his person and property, under the special charge, control, and protection of the Secretary of the Interior of the United States; that prior to February 1, 1923, the plaintiff, as a member of the Creek or Muskogee Tribe or Nation of Indians, was duly allotted and received as his distribution, portion, or share of the lands of the Creek Nation certain property in Creek County, Oklahoma, described as the southeast quarter of section five (5), township seventeen (17), range 7 east; that under the laws of the United States said land was restricted land; and that thereafter said land was duly leased for oil and gas purposes and, pursuant to the terms and conditions of the agreement under which said land was leased, sums of money were from time to time duly paid to the Secretary of the Interior on account of royalties and bonuses, payable under said lease, which said sums of money were restricted funds in the hands of the Secretary of the Interior; that thereafter out of said sums of money the Secretary of the Interior, pursuant to authority conferred upon him by the laws of the United States, duly purchased the $550,000 principal amount of Liberty loan bonds referred to in said amended bill; that on or about February 1, 1923, the Secretary of the Interior, at the request and with the knowledge and consent of the plaintiff and pursuant to authority conferred upon him by the laws of the United States, duly delivered to this defendant the $550,000 prin-
cipal amount of Liberty loan bonds referred to in said
91 amended bill, to be by it delivered to defendant The Equitable Trust Company of New York under a trust agreement to be approved by the Secretary of the Interior, and thereafter this defendant duly delivered said bonds to the defendant The Equitable Trust Company of New York under a trust agreement approved by the Secretary of the Interior, a copy of which is

annexed hereto and marked "Exhibit A," and that they have been and at all times since then and now are held by The Equitable Trust Company of New York under the provisions of said trust agreement; that by the execution of said trust agreement and the delivery of said bonds as aforesaid, a valid trust was created upon the terms and conditions set forth in said trust agreement and the same is now in all respects a valid trust and the defendant The Equitable Trust Company of New York holds said $550,000 principal amount of Liberty loan bonds for the uses and purposes set forth in said trust agreement. That the Secretary of the Interior as a further condition of said transaction in respect to said bonds required this defendant to execute and deliver to him a certain declaration of trust of which a copy is hereto annexed and marked "Exhibit B." That neither the plaintiff nor any person claiming by, through, or under him, or representing him as guardian or committee or otherwise, has any right to question or attack in any way the validity of said trust created by the execution of said trust agreement and the delivery of said bonds to the defendant The Equitable Trust Company of New York as aforesaid, or the validity or conclusiveness of the acts of the Secretary of the Interior
92 in connection therewith, and that none of the acts of the Secretary of the Interior in connection therewith, and that none of the acts of the Secretary of the Interior as aforesaid, is subject to review by this or any other court.

Wherefore this defendant prays that said amended bill be dismissed and for judgment for its costs in this behalf incurred.

THE AMERICAN BAPTIST HOME MISSION SOCIETY,
By CHAS. S. FETTRETCH, *General Counsel.*

CHAS. S. FETTRETCH,
Attorney for the American
Baptist Home Mission Society.

Statement re exhibits to answer

Exhibit A: This is the same as Exhibit A attached to answer of The Equitable Trust Company of New York.

Exhibit B: This is the same as Exhibit B attached to answer of The Equitable Trust Company of New York.

93 In United States District Court

[Title omitted.]

Motion of United States for leave to intervene

Comes now the United States of America by Emory R. Buckner, United States attorney, and move the court for leave to intervene in the above-entitled caused and file an intervening petition, of which proposed intervening petition the attached is a copy.

United States of America, by B. M. Parmenter, Assistant Attorney General.

Nat M. Lacy, special assistant to the Attorney General.

Emory R. Buckner, United States attorney, Southern District of New York.

To the Attorneys for the Plaintiff and Defendants:

Please Take Notice that the foregoing motion will be called to the attention of the presiding judge of this court hearing motions
94 on Tuesday, January 5, 1926, at ten thirty o'clock a. m., on or soon thereafter as the same may be reached.

UNITED STATES OF AMERICA,
By B. M. PARMENTER,
Assistant Attorney General.
NAT M. LACY,
Special Assistant to the Attorney General.
EMORY R. BUCKNER,
United States Attorney, Southern District of New York.

95 In United States District Court

[Title omitted.]

Petition of intervention of the United States

Comes now the United States of America and, having first secured permission of court, files this its petition of intervention, and for cause of action alleges and states:

1. That Jackson Barnett is a full-blood member of the Muskogee or Creek Tribe of Indians duly enrolled opposite roll No. 4264, and is a resident of the United States and domiciled in the State of Oklahoma. That as such citizen of the Creek nation there was allotted to him as his distributive share of the lands of the Creek Nation 160 acres of land in what is now Creek County, State of Oklahoma.

2. This intervenor alleges that Jackson Barnett is approximately of the age of seventy-five years; that at all times herein mentioned he was and is now a mental incompetent, ignorant, uneducated,
96 and unable to read or write and wholly incapable of understanding or comprehending the value, condition, character, nature, or extent of his estate, and incapable of caring for himself and managing his property, and incapable of discerning or aprpeciating the motives and designs of any person or persons with whom he came in contact, and incapable of comprehending or understanding any of the written instruments, purported trusts, requests, and agreements hereinafter mentioned.

3. That prior to April, 1912, the Congress of the United States had conferred upon the County Courts of the State of Oklahoma (which are the courts exercising probate jurisdiction) full and com-

plete jurisdiction of the guardianship of the persons and estates of minors and incompetents, whether Indians, freedmen, or otherwise. That on and prior to said date there were in force in the State of Oklahoma certain statutes of said State, now section 1449, 1450, 1451, and 4893 of the Compiled Statutes of Oklahoma, 1921, which provide as follows:

"1449. Petitions for guardians of incompetent or insane persons. When it is represented to the county court upon verified petition of any relative or friend that any person is insane, or from any cause mentally incompetent to manage his property, the judge must cause notice to be given to the supposed insane or incompetent person, of the time and place of hearing the case, not less than five days before the time so appointed, and such person, if able to attend, must be produced before him on the hearing.

97 "1450. Guardian appointed when. If after a full hearing and examination upon such petition it appears to the judge of the County Court that the person in question is incapable of taking care of himself and managing his property, he must appoint a guardian of his person and estate, with the powers and duties in this article (chapter) specified.

"1451. Bond and powers of guardian. Every guardian appointed as provided in the preceding section has the care and custody of the person of his ward, and the management of all his estate, until such guardian is legally discharged; and he must give bond to such ward, in like manner and with like conditions, as before prescribed with respect to the guardian of a minor.

"4983. Judicial determination of incapacity. After his incapacity has been judicially determined a person of unsound mind can make no conveyance or other contract, nor designate any power, nor waive any right, until his restoration to capacity is judicially determined. But if actually restored to capacity, he may make a will, though his restoration is not thus determined."

4. That pursuant to the acts of Congress and the laws of the State of Oklahoma, as aforesaid, proceedings were duly had in the County Court of Okmulgee County, Oklahoma, said county being the residence of Jackson Barnett, whereby on the 29th day of April, 1912, Jackson Barnett was adjudged to be mentally incom-

98 petent, and Carl J. O'Hornett was appointed guardian of his person and estate, who thereupon duly qualified and assumed the duties of such guardianship and continued to act in such capacity until the 18th day of June, 1923, at which time he resigned and Elmer S. Bailey was on said date appointed the successor of the said Carl J. O'Hornett. That said Elmer S. Bailey on said date duly qualified as the guardian of said incompetent, and assumed the duties of such guardianship, and has been at all times since and now is acting in such capacity.

5. That at all times prior to the transaction involved in this action, Jackson Barnett was recognized as a mental incompetent and Carl

J. O'Hornett was recognized as his legal guardian by the Secretary of the Interior of the United States of America, by the Commissioner of Indian Affairs, by the Superintendent for the Five Civilized Tribes, and by all other officers or branches of the Department of the Interior with which he came in contact, and large sums of money held for said incompetent by the Secretary of the Interior or the Superintendent for the Five Civilized Tribes were paid to said guardian for the use and benefit of said incompetent upon orders of the County Court of Okmulgee County, Oklahoma, and that no part of the funds of said incompetent held by the Secretary of the Interior or the Superintendent for the Five Civilized Tribes were paid out other than to or through said Carl J. O'Hornett as the guardian of said incompetent upon orders of said County Court.

6. That subsequent to the appointment of Carl J. O'Hornett
99 as such guardian and upon appropriate orders of the County Court of Okmulgee County, Oklahoma, he entered into an oil and gas mining lease with H. U. Bartlett, as lessee, covering the allotment of said incompetent. That said lease was made for a period of ten years and as much longer thereafter as oil or gas should be produced, and was made on a form prescribed by the Secretary of the Interior and provided for the payment of the royalties therein reserved to the United States Indian superintendent for the use and benefit of Jackson Barnett. Said lease was duly approved by the Secretary of the Interior.

7. That pursuant to said lease the lessor and his assigns entered upon said allotment of land and drilled oil and gas wells and produced large quantities of oil and gas, and the royalties reserved in said lease were paid to the United States Indian superintendent until that office was abolished on August 1, 1914, and thereafter said royalties were paid to the Superintendent for the Five Civilized Tribes, which office was created in lieu of the office of the United States Indian superintendent.

8. That prior to February, 1923, out of the royalties and rentals from said lease, there had been accumulated in the hands of the Superintendent for the Five Civilized Tribes a sum in excess of $1,100,000, and that prior to February, 1923, said money to the extent of $1,100,000 had been invested in United States Liberty loan bonds and said bonds were, on said date, in the hands of the Secretary of the Interior.

9. That in the month of February, 1920, one Anna Laura Lowe took said Jackson Barnett from his home in Okmulgee County,
100 Oklahoma, to Coffeyville, Kansas, where she procured a marriage license and went through a purported marriage ceremony with said incompetent, and thereafter claimed and now claims to be the lawful wife of said incompetent, and goes by the name of Anna Laura Barnett, by which name she will be hereinafter referred to. That immediately thereafter said Anna Laura Barnett employed one Harold McGugin, a lawyer of Coffeyville, Kansas, who immedi-

ately started negotiations with the Secretary of the Interior and his subordinates for the purpose of acquiring for Anna Laura Barnett from the estate of Jackson Barnett, then in the hands of the Secretary of the Interior, or the Superintendent for the Five Civilized Tribes, a large portion of his estate, which negotiations culminated in February, 1923, in the delivery by the Honorable Albert B. Fall, the then Secretary of the Interior of United States, liberty loan bonds of the par value of $550,000 to Anna Laura Barnett, and to the American Baptist Home Mission Society, United States liberty loan bonds of the par value of $550,000, all of said bonds being the property of Jackson Barnett.

10. That said gifts were made upon the written request of Jackson Barnett, addressed to the Secretary of the Interior, signed by the thumb mark of said incompetent, and that said gifts were made without the knowledge or consent of Carl J. O'Hornett, guardian of Jackson Barnett, or of the County Court of Okmulgee County, Oklahoma.

11. That the acts of Congress conferring on the County Courts of Oklahoma jurisdiction of the guardianship of incompetent
101 Creek Indians constitutes said county courts for that purpose Federal agencies, and the guardianships thereby imposed are Federal restrictions. And that by reason thereof, and by reason of the appointment by the County Court of Okmulgee County, Oklahoma, of a guardian for Jackson Barnett, as aforesaid, and by reason of the incompetency of Jackson Barnett, the Secretary of the Interior was without power or authority to make said gifts upon the request of Jackson Barnett, as aforesaid.

12. That the United States Liberty loan bonds delivered to the American Baptist Home Mission Society, as aforesaid, were deposited in the Equitable Trust Company of New York City, under a certain trust agreement between the American Baptist Home Mission Society and the Equitable Trust Company, defendants herein, whereby the income from said bonds to the extent of $20,000 per annum is payable to Jackson Barnett during his life-time, and all income in excess of said amount is payable to the American Baptist Home Mission Society, and that said bonds or the proceeds thereof are now in the hands of the Equitable Trust Company, and that large sums of interest have been collected by the Equitable Trust Company, which it still holds in its possession, the exact amount of which is to this intervenor unknown, but that said information is in the possession of defendants.

That intervenor has no complete and adequate remedy at law.

Wherefore, the premises considered, intervenor prays:

1. That the defendants, the Equitable Trust Company and
102 the American Baptist Home Mission Society, may be declared to have received and held the United States Liberty loan bonds heretofore described and amounting to the sum of $550,000 par value as the property of Jackson Barnett.

2. That the defendants, Equitable Trust Company and the American Baptist Home Mission Society, be declared to hold said bonds or the proceeds thereof, and all interest and profits received therefrom for the use and benefit of Jackson Barnett, and that said defendants be required to fully account for said bonds and the proceeds thereof, and all interest and profits therefrom, and that after deducting the reasonable expenses incident to this litigation said bonds or the proceeds thereof and the interest and profits thereon be delivered or paid over to the Secretary of the Interior of the United States; that the defendants, Equitable Trust Company and the American Baptist Home Mission Society, be decreed to have no right, title, or interest in and to said bonds or the proceeds thereof, or the interest thereon, and that intervenor have such other and further relief as to the court may seem meet and proper.

UNITED STATES OF AMERICA,
By B. M. PARMENTER,
Assistant Attorney General.
NAT M. LACY,
Special Assistant to the Attorney General.
EMORY R. BUCKNER,
United States District Attorney.

103 [*Duly sworn to by Nat M. Lacy; jurat omitted in printing.*]

104 In United States District Court

[Title omitted.]

Opinion of Thacher, D. J., on motion of United States for leave to intervene

This is a motion made by the United States of America for leave to intervent in this suit and to file its intervening petition herein, which was presented with the motion. Intervention is opposed by the defendant The American Baptist Home Mission Society, but not by any other party to the suit.

From the complaint it appears that suit is brought in the name of Jackson Barnett by Elmer S. Bailey, as his next friend, who it is alleged was appointed as guardian of his person and estate under a decree of the County Court of Okmulgee County, Oklahoma, declaring him to be mentally incompetent. It is alleged in the complaint that Jackson Barnett is a full-blood member of the Muskogee or Creek Tribe of Indians, and is 75 years of age. As a member of this tribe certain lands in the Indian Territory
105 were allotted to him under the laws of the United States.

In August, 1912, under the supervision of the Secretary of the Interior, a lease of these lands was made and executed by Jackson Barnett and Carl J. O'Hornett, as guardian under the original decree of the County Court of Okmulgee County, declaring Bar-

nett to be mentally incompetent. This lease provided for the payment of royalties for oil and gas produced on the property to the United States Indian superintendent for Jackson Barnett, and there have been paid thereunder to the United States Indian superintendent, prior to August, 1914, and thereafter to the Superintendent for the Five Civilized Tribes, large sums of money. Prior to December 15, 1922, these accumulated payments in the hands of the Superintendent for the Five Civilized Tribes, for the use and benefit of Jackson Barnett, were in excess of $1,100,000, which sum, prior to that date, was transferred by the Superintendent for the Five Civilized Tribes to the Secretary of the Interior, and by him invested in United States Liberty loan bonds. Of these bonds $550,000 par values were, with the approval of the Secretary of the Interior, pursuant to an instrument of gift which bears the thumb-mark of Jackson Barnett, delivered to the defendant The American Baptist Home Mission Society, and in turn delivered by it to the defendant The Equitable Trust Company of New York under an agreement that said trust company should hold the bonds or the proceeds thereof as trustee during the life of Jackson Barnett, meanwhile paying all income therefrom in excess of $20,000 in any one year
106 to the American Baptist Home Mission Society, and upon Barnett's death to deliver said bonds, or the proceeds thereof, to the American Baptist Home Mission Society.

It is alleged that the Secretary of the Interior was wholly without jurisdiction or authority to approve this distribution from the estate of Jackson Barnett, or to pay out or authorize the payment of said funds to any person other than to or through his legal guardian upon proper order of the County Court of Okmulgee County, Oklahoma.

There are many other allegations in the complaint which need not be referred to at this time upon which relief in this court is sought, including a decree declaring that the property and its avails was received and is now held by the trust company as the property of the plaintiff, impressing the same with a trust in favor of the plaintiff, requiring the defendants to account and to transfer and turn over the property and its avails to the plaintiff.

The United States by its petition asserts the mental incompetence of Jackson Barnett, the jurisdiction of the County Court of Okmulgee County, Oklahoma, its decree under which Jackson Barnett was adjudged to be mentally incompetent, and the appointment first of Carl J. O'Hornett as guardian of his person and estate, and later, upon O'Hornett's resignation, of Elmer S. Bailey, as such guardian; that the Secretary of the Interior was without power or authority to make the gift in suit upon the request of Jackson Barnett, and in its prayer for relief prays that the defendants may be declared to have received and held the United States Liberty loan
107 bonds amounting to $550,000 par value as the property of Jackson Barnett, and may be declared to hold said bonds,

or the proceeds thereof, for his use and benefit, and be required to fully account therefor, and after deducting the reasonable expenses incident to this litigation to deliver said bonds, and the proceeds thereof, to the Secretary of the Interior of the United States.

The motion and the petition are signed in the name of the United States of America by B. M. Parmenter, Assistant Attorney General; Nat M. Lacy, special assistant to the Attorney General; and Emory R. Buckner, United States attorney for the Southern District of New York. The interest of the United States in this litigation is apparent if upon its successful termination the Secretary of the Interior is entitled to receive the trust estate and its avails. It is sufficient to say that this claim, asserted by the Attorney General and the United States attorney, is certainly not frivolous upon its face, and therefore may be presented by intervening petition for consideration, and determination by the court. It is, however, insisted that neither the Attorney General, his assistants, nor the United States attorney are authorized to assert such a claim in behalf of the United States in the absence of request by the Secretary of the Interior or direction from the President of the United States.

The Revised Statutes defining the duties and powers of the Attorney General as the head of the Department of Justice provide that he "may, whenever he deems it for the interest of the United States, either in person conduct and argue any case in any court of
108 the United States in which the United States is interested, or may direct the Solicitor General or any officer of the Department of Justice to do so." (R. S., 359.) And further: "The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in any suit pending in any of the courts of the United States, or in the courts of any State, or to attend to any other interest of the United States." (R. S., 367.) The duty of general superintendence and direction over United States attorneys as to the manner of discharging their respective duties is imposed upon the Attorney General by section 362, R. S.; and by section 771, R. S., it is made the duty of every district attorney to prosecute in his district "all civil actions in which the United States are concerned." By the act of June 30, 1906 (ch. 3925, Compiled Statutes, sec. 534), it is provided: "The Attorney General, or any officer of the Department of Justice, or any attorney or counsellor specially appointed by the Attorney General under any provision of law, may, when thereunto specifically directed by the Attorney General, conduct any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys now are or hereafter may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceeding is brought."

By these statutes intervention in this suit in order to assert and protect the alleged interest of the United States as custodian

100 of the restricted property of Jackson Barnett is fully authorized without special act of Congress, direction of the President of the United States, or request of the Secretary of the Interior. U. S. v. San Jacinto Tin Co., 125 U. S. 273; Kern River Co. v. U. S., 257 U. S. 147, 154–155; Ponzi v. Fessenden, 258 U. S. 254, 262; Sanitary District v. U. S., 266 U. S. 405, 426.)

When the Attorney General appears in a court of justice to assert the rights of the United States, questioning the action of a Cabinet officer (in this case the Secretary of the Interior) as unauthorized by law, he appears for and represents the sovereign, and it is not the function of the court to look beyond the statutes authorizing him to do so, or to inquire into the correspondence which may have passed between him and the head of the department whose action is questioned. The motion of the United States for leave to file its intervening petition herein is accordingly granted.

THOMAS D. THACHER.

Dated January 20, 1926.

110 In United States District Court

[Title omitted.]

Answer of Equitable Trust Co. to petition of intervention

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The answer of the defendant The Equitable Trust Company of New York to the petition of intervention of the United States of America herein, respectively shows to this court as follows:

1. Answering the first paragraph of said petition, this defendant states that it is without knowledge whether the plaintiff, Jackson Barnett, is domiciled in the State of Oklahoma, and this defendant admits the other allegations therein contained.

2. Answering the second paragraph of said petition, this 111 defendant states that it is without knowledge of the age of said plaintiff, Jackson Barnett. It admits that he is and was at all the times mentioned in said petition uneducated and unable to read or write; but it denies that said plaintiff, Jackson Barnett, now is, or at any of the times mentioned in said petition was a mental incompetent, ignorant, or incapable of understanding or comprehending the value, condition, character, nature, or extent of his estate or any part thereof, or incapable of caring for himself or managing his property, or incapable of discerning or appreciating the motives or designs of any person or persons with whom he came in contact, or incapable of comprehending or understanding any of the written instruments, purported trusts, requests, or agreements mentions in said petition.

3. This defendant states that it is advised that it is not called upon the make answer to the third paragraph of said petition, the same containing mere conclusions of law.

4. Answering the fourth paragraph of said petition, this defendant states that it is without knowledge whether plaintiff was duly adjudged to be mentally incompetent by the County Court of Okmulgee County, Oklahoma, on or about April 29, 1912, or at any of the times mentioned in said petition, or whether said court then or at any of the times mentioned in said petition had jurisdiction of plaintiff's person or estate, or whether said county was at that time the place of residence of plaintiff, or whether said proceedings mantioned in said paragraph were had pursuant to the acts
112 of Congress or the laws of the State of Oklahoma referred to in the fourth paragraph of said petition, or whether on or about April 29, 1912, or at any of the times mentioned in said petition, a guardian of the person or estate of said plaintiff was appointed by the said County Court of Okmulgee County, or whether the guardian, if any, so appointed, thereupon duly qualified or acted as such until June 13, 1923, or, on said date or at any other time, resigned, or whether Elmer S. Bailey was thereupon appointed as the successor of said guardian, or whether said Elmer S. Bailey duly qualified as such guardian or assumed the duties thereof, or whether then or at any time since he had acted or is now acting in such capacity, and therefore holds plaintiff to strict proof of all thereof.

5. Answering the fifth paragraph of said petition, this defendant states that it is without knowledge whether at all times prior to the transactions complained of in said petition or at any other time said plaintiff Jackson Barnett, was recognized as a mental incompetent and Carl J. O'Hornett as his legal guardian by the Secretary of the Interior, the Commissioner of Indian Affairs, the Superintendent for the Five Civilized Tribes, and by all other officers and branches of the Department of the Interior with whom said plaintiff, Jackson Barnett, came in contact, or as to what, if any, sums of money held for plaintiff by the Secretary of the Interior or the Superintendent for the Five Civilized Tribes were paid to said Carl J. O'Hornett for the use and benefit of plaintiff upon orders of the County Court of Okmulgee County, Oklahoma, or whether
113 any part of plaintiff's funds held by the Secretary of the Interior or the Superintendent for the Five Civilized Tribes were paid out other than to or through said O'Hornett as the alleged guardian of plaintiff upon orders of said County Court.

6. Answering the sixth paragraph of said petition, this defendant admits that on or about August 22nd, 1912, Carl J. O'Hornett, purporting to act as guardian for plaintiff, and upon an order of said County Court, entered into an oil and gas mining lease with H. U. Bartlett as lessee, covering the allotment to plaintiff, and that said lease was made for a period of ten years from the date of its approval by the Secretary of the Interior and as much longer thereafter as oil or gas should be found on said premises in paying quantities, and that said lease was made on a form prescribed by the Secretary of the Interior and provided for the payment of the royalties therein reserved to the United States Indian superintend-

ent for the the use and benefit of plaintiff, and that said lease was approved by the Secretary of the Interior, but this defendant states that it is without knowledge whether said O'Hornett had theretofore been appointed as guardian of plaintiff or whether said O'Hornett was then acting as such guardian.

7. Answering the seventh paragraph of said petition, this defendant admits the allegations therein contained.

8. Answering the eighth paragraph of said petition, this defendant admits the allegations therein contained.

114 9. Answering the ninth paragraph of said petition, this defendant denies that at any time therein mentioned plaintiff was incompetent. It admits that Anna Laura Barnett claims to be the lawful wife of plaintiff and goes by said name, and it also admits that in February, 1923, the then Secretary of the Interior delivered to said Anna Laura Barnett United States Liberty loan bonds of the par value of $550,000, and that said Secretary of the Interior also in February, 1923, delivered to the defendant The American Baptist Home Mission Society United States Liberty loan bonds of the par value of $550,000, and that all of said bonds were, prior to said delivery, the property of plaintiff, but defendant states that it is without knowledge in respect to all of the other matters set forth in said paragraph.

10. Answering the tenth paragraph of said petition, this defendant admits that said gifts were made upon the written request of plaintiff addressed to the Secretary of the Interior, signed by the thumb mark of plaintiff, but this defendant states that it is without knowledge as to whether said gifts were made without the knowledge or consent of said O'Hornett, the alleged guardian of plaintiff, or without the knowledge or consent of the County Court of Okmulgee County, Oklahoma.

11. This defendant states that it is advised that it is not called upon to make answer to the eleventh paragraph of said petition, the same containing mere conclusions of law.

115 12. Answering the twelfth paragraph of said Petition, this defendant admits all of the allegations therein contained.

13. This defendants denies that said intervenor has no complete and adequate remedy at law.

And this defendant further says as a separate and distinct defense to said petition.

14. The plaintiff is a full-blood member of the Muskogee or Creek Tribe or Nation of Indians, which is one of the Five Civilized Tribes, and he is and at all times hereinafter mentioned was a so-called "restricted Indian," and as such was and is, under the Constitution and laws of the United States, both as to his person and property, under the special charge, control, and protection of the Secretary of the Interior of the United States; that prior to February 1, 1923, the plaintiff, as a member of the Creek or Muskogee Tribe or Nation of Indians, was duly allotted and received as his distribution, portion, or share of the lands of the Creek Nation certain property in Creek

County, Oklahoma, described as the southeast quarter of section five (5), township seventeen (17), Range 7 east; that under the laws of the United States said land was restricted land; and that thereafter said land was duly leased for oil and gas purposes an pursuant to the terms an conditions of the agreement under which said land was leased, sums of money were from time to time duly paid to the Secretary of the Interior on account of royalties and bonuses
116 payable under said lease, which said sums of money were restricted funds in the hands of the Secretary of the Interior; that thereafter out of said sums of money the Secretary of the Interior, pursuant to authority conferred upon him by the laws of the United States, duly purchased the $550,000 principal amount of Liberty loan bonds referred to in said petition; that on or about February 1, 1923, the Secretary of the Interior, at the request and with the knowledge and consent of the plaintiff and pursuant to authority conferred upon him by the laws of the United States, duly delivered to the defendant The American Baptist Home Mission Society the $550,000 principal amount of Liberty loan bonds referred to in said petition, to be by it delivered to this defendant under a trust agreement to be approved by the Secretary of the Interior, and thereafter said defendant The American Baptist Home Mission Society duly delivered said bonds to this defendant under a trust agreement approve by the Secretary of the Interior, a copy of which is annexed to the answer of this defendant to the amended bill of complaint herein and marked "Exhibit A," and that they have been and at all times since then and now are held by this defendant under the provisions of said trust agreement; that by the execution of said trust agreement and the delivery of said bonds as aforesaid, a valid trust was created upon the terms and conditions set forth in said trust agreement and the same is now in all respects a valid trust, and this defendant holds said $550,000 principal amount of Liberty loan bonds for the uses and purposes set forth in said trust agree-
117 ment. That the Secretary of the Interior as a further condition of said transaction in respect to said bonds required said defendant The American Baptist Home Mission Society to execute and deliver to him a certain declaration of trust of which a copy is annexed to the answer of this defendant to the amended bill of complaint herein and marked "Exhibit B." That neither the plaintiff nor any person claiming by, through, or under him, or representing him as guardian or committee or otherwise, no said intervenor, has any right to question or attack in any way the validity of said trust created by the execution of said trust agreement and the delivery of said bonds to this defendant as aforesaid, or the validity or conclusiveness of the acts of the Secretary of the Interior in connection therewith, and that none of the acts of the Secretary of the Interior in connection therewith, and that none of the acts of the Secretary of the Interior as aforesaid, is subject to review by this or any other court.

Wherefore this defendant prays that said petition be dismissed and for judgment for its costs in this behalf incurred.

MURRAY, ALDRICH & ROBERTS,
Solicitors for Defendant,
The Equitable Trust Company of New York,
37 Wall Street, New York City.

118 In United States District Court

[Title omitted.]

Answer of The American Baptist Home Mission Society to the petition of intervention

The answer of the defendant The American Baptist Home Mission Society to the petition of intervention of the United States herein respectfully shows to the court as follows:

1. Answering the first paragraph of said petition, this defendant admits the allegations therein contained.

2. Answering the second paragraph of said petition, this defendant states that it is without knowledge of the age of said Jackson Barnett; it admits that he is and was at all the times mentioned in said petition, uneducated, and unable to read or write, but it denies that said Jackson Barnett now is or at any of the times mentioned
119 in said petition, was an imbecile, ignorant, or incapable of understanding or comprehending the value, condition, character, nature, or extent of his estate or any part thereof; or incapable of caring for himself or managing his property, or incapable of discerning or appreciating the motives or designs of any person or persons with whom he came in contact, or incapable of comprehending or understanding any of the written instruments, trusts, requests, or agreements mentioned in said petition.

3. This defendant states that it is advised that it is not called upon to make answer to paragraph 3 of said petition, the same containing mere conclusions of law.

4. Answering the fourth paragraph of said petition, this defendant states that it is without knowledge whether plaintiff was duly adjudged to be mentally incompetent by the County Court of Okmulgee County, Oklahoma, on or about April 29th, 1912, or at any of the times mentioned in said petition had jurisdiction of either plaintiff's person or estate, or whether said county was at that time the place of residence of plaintiff, or whether said proceedings mentioned in said paragraph were had pursuant to the acts of Congress or the laws of the State of Oklahoma referred to in paragraph 4 of said petition, or whether on or about April 29th, 1912, or at any of the times mentioned in said petition, a guardian of the person or estate of plaintiff was appointed by the said County Court of Okmulgee County, or whether the guardian, if any, so appointed there-

120 upon duly qualified or acted as such until the 13th June, 1923, or on said date or at any other time resigned, or whether Elmer S. Bailey was thereupon appointed as the successor of said guardian, or whether said Elmer S. Bailey duly qualified as such guardian, or assumed the duties thereof, or whether then or at any time since he has acted or is now acting in such capacity, and therefore holds plaintiff to strict proof of all thereof.

5. Answering the fifth paragraph of said petition, this defendant states that it is without knowledge whether at all times prior to the transactions complained of in said petition or at any other time said Jackson Barnett was recognized as a mental incompetent, and Carl J. O'Hornett, as his legal guardian by the Secretary of the Interior, the Commissioner of Indian Affairs, the Superintendent for the Five Civilized Tribes, and by all other officers and branches of the Department of the Interior with whom said Jackson Barnett came in contact, or as to what, if any, sums of money held for plaintiff by the Secretary of the Interior or the Superintendent for the Five Civilized Tribes were paid to said Carl J. O'Hornett for the use and benefit of plaintiff upon orders of the County Court of Okmulgee County, Oklahoma, or whether any part of plaintiff's funds held by the Secretary of the Interior or the Superintendent for the Five Civilized Tribes were paid out other than to or through said O'Hornett as the alleged guardian of plaintiff, upon orders of said County Court.

6. Answering the sixth paragraph of said petition, this de-
121 fendant admits that on or about August 22nd, 1912, Carl J. O'Hornett, purporting to act as guardian for plaintiff, and upon an order of said County Court entered into an oil and gas mining lease with H. U. Bartlett as lessee, covering the allotment to plaintiff, and that said lease was made for a period of ten years from the date of its approval by the Secretary of the Interior and as much longer thereafter as oil or gas should be found on said premises in paying quantities, and that said lease was made on a form prescribed by the Secretary of the Interior and provided for the payment of the royalties therein reserved to the United States Indian superintendent for the use and benefit of plaintiff, and that said lease was approved by the Secretary of the Interior, but this defendant states that it is without knowledge whether said O'Hornett had theretofore been appointed as guardian of plaintiff or whether said O'Hornett was then acting as such guardian.

7. Answering the seventh paragraph of said petition, this defendant admits the allegations therein contained.

8. Answering the eighth paragraph of said petition, this defendant admits the allegations therein contained.

9. Answering the ninth paragraph of said petition, this defendant denies that at any time therein mentioned plaintiff was incompetent. It admits that Anna Laura Barnett claims to be the lawful wife of plaintiff and goes by said name, and it also admits that
122 in February, 1923, the then Secretary of the Interior delivered

to said Anna Laura Barnett United States Liberty Loan bonds of the par value of $550,000, and that said Secretary of the Interior also in February, 1923, delivered to this defendant United States Liberty loan bonds of the par value of $550,000 and that all of said bonds were, prior to said delivery, the property of plaintiff, but defendant states that it is without knowledge in respect to all of the other matters set forth in said paragraph.

10. Answering the tenth paragraph of said petition, this defendant admits that said gifts were made upon the written request of plaintiff addressed to the Secretary of the Interior, signed by the thumb mark of plaintiff, but this defendant states that it is without knowledge as to whether said gifts were made without the knowledge or consent of said O'Hornett, the alleged guardian of plaintiff, or without the knowledge or consent of the County Court of Okmulgee County, Oklahoma.

11. This defendant states that it is advised that it is not called upon to make answer to paragraph 11 of said petition, the same containing mere conclusions of law.

12. Answering the twelfth paragraph of said petition, this defendant denies that it knows the exact amount of the interest upon said bonds mentioned in said petition collected by defendant Equitable Trust Company and which the latter still holds in its possession, and this defendant admits all the other allegations contained in said paragraph.

123 13. This defendant denies that said intervenor has no complete and adequate remedy at law.

And this defendant further says as a separate and distinct defense to said petition:

14. The plaintiff is a full-blood member of the Muskogee or Creek Tribe or Nation of Indians, which is one of the Five Civilized Tribes, and he is and at all times hereinafter mentioned was a so-called "restricted Indian," and as such was and is, under the Constitution and laws of the United States, both as to his person and property, under the special charge, control, and protection of the Secretary of the Interior of the United States; that prior to February 1, 1923, the plaintiff, as a member of the Creek or Muskogee Tribe of Nation of Indians, was duly allotted and received as his distribution, portion, or share of the lands of the Creek Nation certain property in Creek County, Oklahoma, described as the southeast quarter of section five (5), Township seventeen (17), Range 7 east; that under the laws of the United States said land was restricted land; and that thereafter said land was duly leased for oil and gas purposes and pursuant to the terms and conditions of the agreement under which said land was leased sums of money were from time to time duly paid to the Secretary of the Interior on account of royalties and bonuses payable under said lease, which said sums of money were restricted funds in the hands of the Secretary of the Interior; that thereafter out of said sums of money the Secretary of the Interior,

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124 pursuant to authority conferred upon him by the laws of the United States, duly purchased the $550,000 principal amount of Liberty loan bonds referred to in said petition; that on or about February 1, 1923, the Secretary of the Interior, at the request and with the knowledge and consent of the plaintiff and pursuant to authority conferred upon him by the laws of the United States, duly delivered to this defendant the $550,000.00 principal amount of Liberty loan bonds referred to in said petition, to be by it delivered to defendant The Equitable Trust Company of New York under a trust agreement to be approved by the Secretary of the Interior, and thereafter this defendant duly delivered said bonds to the defendant The Equitable Trust Company of New York under a trust agreement approved by the Secretary of the Interior, a copy of which is annexed to the answer of this defendant to the amended bill herein and marked "Exhibit A," and that they have been and at all times since then and now are held by the Equitable Trust Company of New York under the provisions of said trust agreement; that by the execution of said trust agreement and the delivery of said bonds as aforesaid a valid trust was created upon the terms and conditions set forth in said trust agreements, and the same is now in all respects a valid trust and the defendant The Equitable Trust Company of New York holds said $550,000 principal amount of Liberty loan bonds for the uses and purposes set forth in said trust agreement. That the Secretary of the Interior as a further condition of said transaction in respect to said bonds required this defendant to execute and deliver to him a certain declaration of
125 trust of which a copy is annexed to the answer of this defendant to the amended bill herein and marked "Exhibit B." That neither the plaintiff nor any person claiming by, through, or under him, or representing him as guardian or committee or otherwise, nor said intervenor, has any right to question or attack in any way the validity of said trust created by the execution of said trust agreement and the delivery of said bonds to the defendant The Equitable Trust Company of New York as aforesaid, or the validity or conclusiveness of the acts of the Secretary of the Interior in connection therewith, and that none of the acts of the Secretary of the Interior in connection therewith, and that none of the acts of the Secretary of the Interior as aforesaid, is subject to review by this or any other court.

Wherefore this defendant prays that said ptition be dismissed and for judgment for its costs in this behalf incurred.

THE AMERICAN BAPTIST HOME MISSION SOCIETY,
By CHARLES S. FETTRETCH, *General Counsel.*

CHAS. B. ROGERS,
CHAS. S. FETTRETCH,
Attorneys for the American Baptist Home Mission Society.

126 In United States District Court

[Title omitted.]

Order granting application for expense money

Mar. 2, 1926

A motion having been made for an allowance of $3,000, out of the income in the hands of the defendant Equitable Trust Company, to be used by the prochein ami in defraying expenses of the prosecution of this suit, and said motion having been argued on October 27, 1925, and decision thereof having been deferred by consent of the parties pending an application of the United States of America
127 for leave to intervene, and said motion having been again heard after the entry of the order of January 29, 1926, granting said motion of the United States for leave to intervene:

Now, upon reading the notice of said motion and the affidavits of Elmer S. Bailey, Carl J. O'Hornett, and Rayburn L. Foster, verified September 18, 1925, the affidavits of Carroll G. Walter, verified September 23 and October 31, 1925, and the joint affidavit of R. L. Foster and A. D. Cochran, verified November 7, 1925, in support of said motion, and the affidavits of Charles S. Fettretch and Harrison Tweed, verified October 26, 1925, in opposition thereto; and upon reading the response of the United States of America to said motion; and after hearing Carroll G. Walter, of counsel for the plaintiff, in support of said motion, and Harrison Tweed, Esq., of counsel for the Equitable Trust Company, and Charles S. Fettretch, Esq., and L. O. Lyttle, Esq., of counsel for the defendant mission society, in opposition thereto, and after hearing Assistant United States Attorney Crawford on behalf of the United States of America; and due deliberation having been had: It is

Ordered that said motion be, and the same is hereby, granted; and that the defendant The Equitable Trust Company of New York be, and it is hereby, authorized and directed to pay to Elmer S. Bailey, the prochein ami herein, out of the income said defendant has received from the $550,000 of bonds now in its possession as set forth in the pleadings herein, the sum of $3,000 to be used by said prochein ami in defraying expenses of the prosecution of this suit, which payment shall be made by paying $1,000 to Patterson,
128 Eagle, Greenough & Day, solicitors of record for the plaintiff herein, and by paying $2,000 to the firm of Hummer & Foster, counsel for the plaintiff herein at Henryetta, Oklahoma; and it is further

Ordered that said $3,000 shall be applicable only to such expenses of this suit as shall hereafter be allowed and approved by this court. Expenses incurred for the benefit of all suits heretofore brought by said Bailey for the recovery of any part of the $1,100,000 mentioned in the amended bill herein shall be deemed expenses of this suit to

the extent of such proportion of the total thereof as the amount claimed in this suit bears to the amount claimed in all such suits, which proportion the parties agree is 550/915.

THOMAS D. THACHER, *U. S. D. J.*

129 In United States District Court

[Title omitted.]

Order permitting amended petition of intervention by United States

April 23, 1926

The United States of America having presented an amended petition of intervention and asked leave to file the same herein:

Now, upon motion of Emory R. Buckner, United States attorney, and upon the subjoined consent of the plaintiff and defendants, it is

130 Ordered that leave to file said amended petition of intervention be, and the same is hereby, granted, and that said petition be, and the same hereby is, ordered on file in this cause; and it is further

Ordered that without the filing of any formal answers to said amended petition by the defendants all allegations of fact contained therein shall be deemed denied by them for want of knowledge, except such facts as are admitted by the defendants in their answers to the amended bill of complaint herein and to the original petition of intervention of the United States; and that his cause henceforth proceed as if formal answers to said amended petition had been filed.

T. D. THACHER, *U. S. D. J.*

We hereby consent to the entry of the foregoing order.

PATTERSON, EAGLE, GREENOUGH & DAY,
Solicitors for Plaintiff:
MURRAY, ALDRICH & ROBERTS,
Solicitors for the Equitable Trust Company of New York.
CHARLES S. FETTRECH,
Solicitor for the American Baptist Home Mission Society.

131 In United States District Court

[Title omitted.]

Amended petition of intervention of the United States

Comes now the United States of America, having first been granted leave of court to file this, its amended petition of intervention, and complains herein of the defendants, The Equitable Trust

Company, a corporation, and The American Baptist Home Mission Society, and for its cause of complaint and action alleges:

1. That Jackson Barnett is a full-blood member and citizen of the Creek Tribe of Indians, duly enrolled as such opposite roll No. 4254, and is a citizen and resident of the United States, with his legal domicile at all times herein mentioned in the State of Oklahoma. That as such citizen and member of the said Creek Tribe of Indians there was allotted to him as his distributive share of the lands
132 of the Creek Nation, one hundred and sixty (160) acres of land described as the southeast quarter of section 5, Township 17 north, of Range 7 east, located in Creek County, State of Oklahoma.

2. That said Jackson Barnett is approximately of the age of seventy-five (75) years and at all times herein mentioned was, and now is, a mental incompetent, illiterate, and unable to read or write, and at all times mentioned herein was wholly incapable of understanding or comprehending the value, condition, character, nature, or extent of his property, as well as incapable of caring for himself or his property and at all times incapable of discerning and understanding the motives and designs of persons with whom he came in contact and incapable of comprehending or understanding the import or nature of simple instruments of writing, and particularly was wholly incapable of comprehending or understanding the purported trusts, instruments, agreements, and transactions hereinafter mentioned.

3. That prior to April, 1912, the Congress of the United States, by statutory enactments, had conferred upon the County Courts of the State of Oklahoma, the courts therein exercising exclusive probate jurisdiction, full, complete, and exclusive jurisdiction in matters of guardianship of the persons and estates of minors and incompetents, whether Indians, freedmen, or otherwise, with limited authority lodged in the Secretary of the Interior to remove restrictions as to restricted Indian lands of members of said tribe, which laws, at all times herein complained of, remained and were in full
133 force and effect; that at the time of the enactment of said acts of Congress and at all times since there were in full force and effect, as forming the applicable statute laws of the State of Oklahoma, the following statutory provisions thereof now shown as a part of the Compiled Statutes of Oklahoma, 1921, and which are designated and which read as follows:

"1449. PETITIONS FOR GUARDIANS OF INCOMPETENT OR INSANE PERSONS. When it is represented to the county court, upon verified petition of any relative or friend, that any person is insane, or from any cause mentally incompetent to manage his property, the judge must cause notice to be given to the supposed insane or incompetent person of the time and place of hearing the case, not less than five days before the time so appointed, and such person, if able to attend, must be produced before him on the hearing.

"1450. GUARDIAN APPOINTED WHEN. If after a full hearing and examination upon such petition, it appears to the judge of the county court that the person in question is incapable of taking care of himself and managing his property, he must appoint a guardian of his person and estate, with the powers and duties in this article (chapter) specified.

"1451. BONDS AND POWERS OF GUARDIAN. Every guardian appointed as provided in the preceding section, has the care and custody of the person of his ward, and the management of all
134 his estate, until such guardian is legally discharged; and he must give bond to such ward, in like manner and with like conditions, as before prescribed with respect to the guardian of a minor.

"4983. JUDICIAL DETERMINATION OF INCAPACITY. After his incapacity has been judicially determined a person of unsound mind can make no conveyance or other contract, nor designate any power, nor waive any right, until his restoration to capacity is judicially determined. But if actually restored to capacity, he may make a will, though his restoration is not thus determined."

4. That under said laws of the State of Oklahoma and the said acts of Congress of the United States, the departments of the United States Government, and particularly the Department of the Interior thereof, the United States courts and all courts of the State of Oklahoma, have at all times recognized, construed, and adjudicated the said laws as conferring on the United States Government through its Department of the Interior a joint control with the said County Courts of Oklahoma and the guardians thereby appointed over the persons and estate of incompetent or minor Indians of said tribe, to the extent of a reserved power in the Secretary of the Interior of said United States to preclude alienation of restricted lands thereof and to remove restrictions therefrom and to approve or reject proposed alienation thereof, as might be proposed under the authority of said courts, by the guardian of such incompetent
135 or minor members of said tribe, all thereof recognizing the authority of said County Courts and the guardians of such incompetents and minors thereby appointed, to manage, control, and deal with the property of such incompetents and minors, subject to the further supervisory authority of said Department of the Interior through its said Secretary thereover, and to withhold payment of oil rents and royalties therefrom to such guardians until in the discretion of said Secretary of the Interior it should appear advisable so to do; that by the uniform decisions of said courts and by the uniform construction of said laws in harmony therewith by the said Secretary and officers of his said department, and thereby at all times observed, in its dealing with said character of incompetent and minor members of said tribe in the State of Oklahoma, and for a long time prior to the times herein complained of, it had been the practice and procedure thereof in dealing with said properties so to

recognize the guardians of incompetent and minor Indians and the authority and jurisdiction of the said County Courts thereover and the said laws of said State, all of which was at all times herein mentioned well known and understood by Anna Laura Lowe, Harold C. McGugin, Walter S. Keith, C. M. McGugin, and the William McGugin Investment Company, a corporation, and by other persons herein complained of, and all of whom at all said times well knew and understood that the said Secretary of the Interior, the Commissioner of Indian Affairs, and all officers of said department of Government, had so recognized the authority of the guardian of
136 the person and estate of said Jackson Barnett and the jurisdiction of the County Court of Okmulgee County, Oklahoma, thereover, and that said Jackson Barnett was a mental incompetent all for a period of more than ten years.

5. That, under authority of said laws, in proceedings duly had in said County Court, of which said county and State said Jackson Barnett was at all times mentioned a resident, the said County Court on the twenty-ninth day of April, 1912, did duly adjudge the said Jackson Barnett to be a mental incompetent and incapable of conducting and managing his business affairs and property, and did thereupon duly appoint one Carl J. O'Hornett as guardian of the person and estate of the said Jackson Barnett, under which appointment said Carl J. O'Hornett did duly qualify and at all times thereafter continued to act in said capacity until the thirteenth day of June, 1923, at which time he resigned and Elmer S. Bailey, the prochein ami herein, was duly appointed as guardian successor thereof by said County Court, and as such duly qualified and since said time has continued to act, and is now acting, in such capacity, and in which capacity he maintains this suit in this court.

6. That at all times since said appointment of said Carl J. O'Hornett as guardian as aforesaid, to the times of the acts and transactions of the said Secretary of the Interior and the Commissioner of Indian Affairs, and Anna Laura Lowe, Harold C. McGugin, Walter S. Keith, C. M. McGugin, and the William McGugin Investment Company, and of other persons herein named, all as hereinafter
137 complained of, the said Jackson Barnett was recognized, regarded, treated, and considered by the United States of America, by and through its said departmental officers and subordinates, as well as by the courts of Oklahoma in which the property interests of said Jackson Barnett were involved, as a mental incompetent both in fact and under said judicial determination, and at all said times said departmental officers, with the one exception as hereinafter complained of, transacted all of its departmental business in which the said Jackson Barnett and his property interests were involved, with and through the said guardian of said Jackson Barnett, and through and under said County Court, and at all said times recognized the said Carl J. O'Hornett as the duly qualified and acting guardian of the person and estate of the said Jackson Barnett, by approving an

oil and gas lease upon the said allotted tract of land made by said guardian and said Jackson Barnett and by paying at divers times to said Carl J. O'Hornett large sums of money as rents and royalties accruing under said lease in the hands of the said department as the property of said Jackson Barnett except as to the one time hereinafter particularly complained of, at which time, February 1, 1923, Albert B. Fall, then Secretary of the Interior, caused to be distributed and delivered all as hereinafter more particularly mentioned, one million and one hundred thousand dollars ($1,100,000.00) of the funds, consisting of United States Liberty loan bonds belonging to the said Jackson Barnett and then in the hands of said Secretary of the Interior.

138 7. That soon after the appointment of said Carl J. O'Hornett as guardian, and upon lawful order of said County Court, said Carl J. O'Hornett, as guardian, joined therein by said Jackson Barnett, executed an oil and gas lease in form prescribed by the said Secretary of the Interior, covering said described allotment of land and executed for the use and benefit of said Jackson Barnett, naming one H. U. Bartlett therein as lessee, said lease running for a period of ten (10) years and as long thereafter as oil and gas should be produced thereon, which said lease was on the thirteenth day of September, 1912, duly approved by the then Secretary of the Interior, the said lease expressly providing that payments of the reserved royalties and rents thereunder should be made to the United States Indian superintendent of Muskogee, Oklahoma, for the use and benefit of the said Jackson Barnett, under which said lease and from time to time said H. U. Bartlett, as lessee, paid into the hands of the said United States Indian superintendent as the depository designated in said lease, until August 1, 1914, at which time said office was abolished by act of Congress, and thereafter for some eight years paid as rents and royalties into the hands of the Superintendent for the Five Civilized Tribes at Muskogee, the succeeding depository under the acts of Congress, until the same had accumulated to an amount in excess of one million and one hundred thousand dollars ($1,100,000.00) and which was by direction of said Secretary of the Interior invested in United States Liberty loan bonds to the extent of one million and one hundred thousand dollars ($1,100,000.00), par value, and
139 in the name of and which were placed in the hands of the said Secretary of the Interior, Albert B. Fall, where said bonds remained until February 1, 1923, when the same were delivered by the said Secretary of the Interior and Commissioner of Indian Affairs to the persons and in the manner as hereinafter complained of.

8. That to a time shortly prior to the execution of said oil lease said tract of land was recognized as possessing but little value, and the said Jackson Barnett as possessing no wealth; that for a long time next prior to and up to the month of about February, 1920, the said tract of land had produced as rents and royalties for the oil therefrom in the hands of said Superintendent for said Five Civilized

Tribes and for said Jackson Barnett an amount in excess of one million dollars ($1,000,000.00), as a result of which up to said time great publicity had been given to the fact through the medium of the newspapers in Oklahoma and Kansas, together with the fact that said Jackson Barnett was an aged mental incompetent, unmarried, and under guardianship created by said County Court of Okmulgee County, Oklahoma, all of which matters had been stressed and given prominence by the press of said States. That one said Anna Laura Lowe, a women of about forty years of age, and who had previously had two marriage ventures, both soon terminating in the divorce courts, and who for eight years prior had had no place of abode other than temporary sojourns in rooming houses in the different cities throughout the country, and with a wide reputation as
140 an adventuress and one making her livelihood by immoral practices, and having visited and lived in different cities in Oklahoma for short periods of time, and having learned of the great wealth and situation and condition of said Jackson Barnett, as hereinbefore alleged, but not having met him, conceived sometime in January, 1920, a plan and design surreptitiously to abduct or kidnap the said Jackson Barnett, by going to his home located in the country some miles from the city of Okmulgee, Oklahoma, and there by seductive smiles, petting and persuasions, and without the knowledge of the said guardian, and with the intent to take advantage of his weak mentality, to induce the said Jackson Barnett to accompany her in an automobile, and without previous acquaintance and without an understanding of her purpose, to take and carry him away and consummate with him a pretended marriage, and thereby and in such manner, as might be thereafter deemed expedient and necessary, obtain the said wealth of the said Jackson Barnett and defraud him out of the same and by said marriage thwart and defraud the United States by impairing, obstructing, and defeating the United States in its governmental relationship over the person and property of the said Jackson Barnett and defeat the United States in the performance of its duty to the said Jackson Barnett as a ward of the nation, in connection with said County Court of Okmulgee County and the said guardian with respect to the person and estate of the said Jackson Barnett, and particularly as to the bonds and fund thereof in possession of the said officers of the Department of the
141 Interior. That thereupon in an attempt to carry out said fraudulent purpose and design, she, the said Anna Laura Lowe, did, about the last of January, 1920, procure an automobile and cause the same to be driven to the said home of said Jackson Barnett and did there by her seductive smiles, flatteries, pettings, and powers procure the said Jackson Barnett to enter her said automobile and to accompany her, and did take the said Jackson Barnett to Okemah and to Holdenville, county seat towns in Oklahoma, where she, the said Anna Laura Lowe, did apply for a marriage license, and where each was refused by the issuing officers by reason of each well knowing the incompetency of Jackson Barnett and the reputa-

tion of the said Anna Laura Lowe; that having failed in her said attempt the said Anna Laura Lowe returned said Jackson Barnett to his home. That again and on the twenty-second day of February, 1920, still having in mind the purpose and design to defraud the said Jackson Barnett and the United States, as aforesaid, she, the said Anna Laura Lowe, did again cause herself to be driven in an automobile to the home of said Jackson Barnett and in the night-time and without notice to said guardian, did again procure in the same manner the said Jackson Barnett to enter her automobile, without knowledge of said Jackson Barnett as to the purpose and plan and in the face of his mental incapacity to know and to understand the purpose, if explained, and with the purpose and intent of the said Anna Laura Lowe to carry out and effectuate her said fraudulent plan to defraud the said Jackson Barnett and the said United States,

142 did take and carry the said Jackson Barnett from his said home and by duress and force did confine him in said automobile and transport him to the city of Coffeyville in the State of Kansas, a distance of some one hundred and fifty miles by traveling throughout the night, and in which said town the said Anna Laura Lowe after procuring a marriage license did procure a marriage ceremony to be performed by a justice of the peace in said town of Coffeyville, pretending to unite herself in wedlock to the said Jackson Barnett; that following said pretended marriage the said Anna Laura Lowe for some days confined the said Jackson Barnett in a room in the said town of Coffeyville, and precluded his guardian and others interested in his welfare from communicating with him, thereafter taking the said Jackson Barnett to and into the State of Missouri, where a second marriage license was procured and a second marriage ceremony caused to be performed purporting to unite the said Anna Laura Lowe and the said Jackson Barnett in lawful wedlock, the said Jackson Barnett at no times knowing and understanding the relationship into which he was being caused to enter nor being able to consent thereto, other than by yielding and submitting because of his mental incapacity; that immediately following said first pretended marriage said Anna Laura Lowe assumed the name of Barnett in furtherance of her said fraudulent purpose and design and immediately advised the officers of the said Department of the Interior that she had become the wife of Jackson Barnett and directing that all funds of said Jackson Barnett in their hands should be held subject

143 to her direction as the wife of said Barnett; that prior to or soon after said pretended marriage the said Anna Laura Lowe made known to Harold C. McGugin her said purpose, plan, and scheme to defraud the said Jackson Barnett and the said United States, and both did thereafter confederate, conspire, and agree, each with the other, to co-operate to the end of accomplishing the same by obtaining the said funds, bonds, and property of the said Jackson Barnett, and in so doing, and in order to accomplish the same, to gain control of said Jackson Barnett by impairing, obstructing, and defeating the United States in the exercise of its governmental control,

as well as the said County Court of Okmulgee County, Oklahoma, and the said guardian, and to acquire under said fraudulent purpose, plan, scheme, and conspiracy a delivery of said funds and bonds of said Jackson Barnett to her, the said Anna Laura Lowe, or to herself and said Harold C. McGugin, by such means as might appear expedient in accomplishment of said fraudulent purpose, plan, scheme and conspiracy as aforesaid, whereunder each were to participate in the funds and property so fraudulently acquired; that in furtherance thereof and from time to time thereafter, said Anna Laura Lowe and said Harold C. McGugin frequently conferred in Kansas, Oklahoma, and Washington, D. C., in furtherance of said fraudulent purpose, plan, scheme, and conspiracy, until the times hereinafter specifically mentioned, when and in the manner hereinafter averred a consummation of said fraudulent scheme and conspiracy was accomplished.

9. That said oil lease, in the form prescribed by the Secretary of the Interior, designated the parties and reads as follows:

144 "This indenture of lease, made and entered into in quadruplicate on this fifth day of March, A. D., 1912, by and between Jackson Barnett and joined in by Carl J. O'Hornett as guardian of said Jackson Barnett, an incompetent, Gage, Oklahoma, enrolled as a full-blood citizen of the Creek Nation, roll No. 4524, party of the first part, hereinafter designated as lessor, and H. U. Bartlett, of Medford, Oklahoma, party of the second part, hereinafter designated as lessee, under and in pursuance of the provisions of the act of Congress approved May 27, 1908 (35 St. L. p. 312), witnesseth."

That a further paragraph of said lease, therein designated "2," so far as applicable to this proceeding, provides and reads as follows:

"The lessee hereby agrees to pay or cause to be paid to the United States Indian superintendent, Union Agency, Muskogee, Oklahoma, for the lessor, as royalty, the sum of twelve and one-half per cent (12½%) of the gross proceeds of all crude oil extracted from the said land, such payment to be made at the time of the sale or removal of the oil * * *"

That a further paragraph of said lease, therein designated "3," so far as applicable to this proceeding, provides and reads as follows:

"Until a producing well is completed on said premises the lessee shall pay or cause to be paid, to superintendent Indian agency,

145 Muskogee, Oklahoma, for lessor, as advance annual royalty, from the date of approval of this lease, fifteen cents ($.15) per acre per annum, annually, in advance, for the first and second years * * *"

That section 8 of said lease, so far as applicable to this case, provides and reads as follows:

"This lease shall be subject to the regulations of the Secretary of the Interior, now or hereinafter in force, relative to such leases, all of which regulations are made a part and condition of this lease,

provided, however, that no regulations made after the approval of this lease affecting either * * * the rates of royalty or payments thereunder * * * shall operate to affect the terms and conditions of this lease."

That the signatures of and the parties executing said oil lease, and the approvals of the officers of said Department of the Interior, as thereon appearing, are as follows, to wit:

"Attest:

"JACKSON (his mark) BARNETT. [SEAL.]
"H. U. BARTLETT. [SEAL.]
"CARL J. O'HORNETT, [SEAL.]

"*As Guardian of Jackson Barnett an incompetent.*

"By the request of Jackson Barnett I wrote his signature on
146 this instrument and he then affixed his mark in execution thereof in my presence.

"N. O. COX, *Witness.*

"The within lease is forwarded to the Commissioner of Indian Affairs with recommendation that it be approved. See my report of even date.

"DANA H. KELSEY,
"*United States Indian Superintendent.*

"DEPARTMENT OF THE INTERIOR,
"OFFICE OF INDIAN AFFAIRS,
"*Washington, D. C., Sept. 12, 1912.*

"Respectfully submitted to the Secretary of the Interior, with recommendation that it be approved.

"F. W. ABBOTT,
"*Assistant Commissioner.*

147 "DEPARTMENT OF THE INTERIOR,
"*Washington, D. C., Sept. 13, 1912.*

"Approved:

"LEWIS C. SAYLIN,
"*Assistant Secretary of the Interior.*

"Filed for record this 6th day of Mar., 1912, at 1.30 o'clock p. m.

"DANA H. KELSEY,
"By R. W. FIELD, *CCC.*"

10. That at all times herein mentioned the following rule and regulation, designated No. 24, promulgated by the Secretary of the Interior, under acts of Congress approved April 24, 1906, May 27, 1908, and February 14, 1920 (Public, No. 141 of 66th Congress), was in force and effect, to-wit:

"All royalties, rents, or payments had under leases which have been or may be approved by the Secretary of the Interior shall be paid to the Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma, or to such other person as may be by the Secretary of

the Interior, for the benefit of the various lessors, or in cases of minors and incompetents, shall be deposited as hereinafter specified. No royalties on such leases shall be paid by the lessee direct to the lessors or to their representatives.

* * * * * * *

148 "All royalties, rents, or payments accruing under any lease made for or on behalf of any minor or incompetent shall be held by the Superintendent for the Five Civilized Tribes, or such other officer as may be designated by the Secretary of the Interior, to the credit of the guardian (or curator) of such minor or incompetent and shall be paid to such guardian (or curator) upon voucher executed by him and approved by the judge of the County (probate) Court having jurisdiction of the estate of such minor or incompetent (the form of such voucher to be prescribed by the department) or upon authority of such court in the form of an order satisfactory to such superintendent or other officer in charge of the office of the Superintendent for the Five Civilized Tribes.

"Provided, however, That the said Superintendent or other officer in charge of the office of the Superintendent for the Five Civilized Tribes is authorized in his discretion, where considered for the best interests of any adult, minor, or incompetent lessor, or his or her heirs, for whose account royalties, rents, or payments accruing under any lease have been paid to said superintendent, to withhold the disbursement of such royalties, rents, or payments, wholly or in part from any such adult or guardian or curator of any such minor or incompetent, or his or her heirs, until such time or times as the payment thereof is considered best for the benefit of said lessor or his or her heirs."

149 11. That said acts of Congress conferred upon the Secretary of the Interior authority to prescribe the form of oil lease and to approve or reject proposed oil leases upon restricted lands of incompetent and minor Indians, members of said tribe, and to prescribe the terms and conditions to be incorporated into said lease and by implication, under said laws, to designate the depository into which the rents and royalties should be paid to the credit of the guardian of such incompetent or minor Indian, and to withhold payment thereof to such guardian until authorized by the County or Probate Court having jurisdiction of the person and estate of said incompetent or minor, and authority over said rents and royalties and concurred in and deemed advisable by the Secretary of the Interior and authorized and directed by him to be paid to such guardian and no greater authority or control thereover, it being the intent and purpose of said laws to recognize the jurisdiction of County Courts of Oklahoma and guardians thereby appointed over incompetent minor Indians of said tribes and their restricted estates, the United States to have joint control therewith over the restricted lands and the rents and royalties inuring to such incompetent and minor Indians therefrom to the end of doubly safeguarding the same.

12. That up to about the month of September, 1922, the said Anna Laura Lowe and said Harold C. McGugin had in furtherance of said fraudulent scheme and plan sought to procure releases of large amounts of said funds for various purposes through the action of the said County Court of Okmulgee County,
150 Oklahoma, and one A. J. Ward, attorney for the said Creek Indian Tribe, and having failed went to the city of Washington, causing the said Jackson Barnett to be taken thereto about said date, and there with said A. J. Ward and one M. L. Mott, both of whom were on intimate terms with and enjoyed the confidence of Charles N. Burke, the then Commissioner of Indian Affairs, and Albert B. Fall, the then Secretary of the Interior, which fact was well known by said Anna Laura Barnett and said Harold C. McGugin, did make known to said A. J. Ward and M. L. Mott the full plan, design, purpose, and scheme, and did then enter into an agreement with the said A. J. Ward and M. L. Mott whereby and whereunder they, the said Anna Laura Lowe, Harold C. McGugin, A. J. Ward, and M. L. Mott, would represent to the said Commissioner Burke and to the said Secretary Fall that the said Jackson Barnett desired to make a gift of five hundred and fifty thousand dollars ($550,000.00) of his said United States bonds then in the hands of said Secretary of the Interior to the said Anna Laura Lowe as his wife, and like amount to the defendant The American Baptist Home Mission Society, and further to represent thereto that said Jackson Barnett had full mental capacity to understand fully the nature and effect of such act, and to represent that many persons were preparing to involve the estate of said Jackson Barnett in litigation in event of his death, and to represent that said Anna Laura Lowe, by virtue of said marriage, became vested with a half inter-estate in all of the said property of said Jackson Barnett, and to represent that said marriage
151 was valid, and thereby to induce the said Secretary of the Interior and the said Commissioner of Indian Affairs to approve a purported request of said Jackson Barnett to make the gifts and accordingly to deliver the said funds and bonds, and to participate therein to the extent of the said Harold C. McGugin one hundred and fifty thousand dollars ($150,000.00), M. L. Mott fifteen thousand dollars ($15,000.00), and Anna Laura Lowe, as the wife, the remainder, and as to whom she was to make further payments, or deliveries, intervenor is without knowledge, but intervenor alleges that under said agreement the said A. J. Ward and M. L. Mott promised to aid and assist the said Anna Laura Lowe and said Harold C. McGugin, and go therewith to the said Secretary of the Interior and Commissioner of Indian Affairs and join in the making of said representations and to co-operate with said Anna Laura Lowe and said Harold C. McGugin, in inducing and influencing the said Commissioner and said Secretary of the Interior to approve said proposed gifts and to make delivery of said bonds accordingly. That immediately following the making

of said agreement and plan the said Anna Laura Lowe, Harold C. McGugin, A. J. Ward, and M. L. Mott began a series of conferences with and appeared before and in the office of said Secretary, the assistant thereto, and the said commissioner, in the city of Washington, taking therewith the said Jackson Barnett, who for a long time had been coached, trained, and tutored by said Anna Laura Lowe, Harold C. McGugin, and A. J. Ward to make responses to inquiries concerning his property and his desires with reference thereto and to the said Anna Laura Lowe as his
152 wife favorable to the making of said gifts, and who had been caused to sign by his thumb mark a purported request to said Secretary to make said gifts in accordance with the said fraudulent plan, purpose, and scheme, as a result of which conference and during all thereof said Anna Laura Lowe, said Harold C. McGugin, A. J. Ward, and M. L. Mott made and repeated said representations to said Secretary and the said Assistant Secretary and the said Commissioner, and caused the said Jackson Barnett to be thereat questioned concerning said matters in accordance with his said coaching, training, and tutoring and to make responses thereto favorable to the making of said gifts, and to state that he understood the effect and import of said pretended request, and said departmental officers, and said Anna Laura Lowe, said Harold C. McGugin, A. J. Ward, and M. L. Mott, well knowing that said guardian and County Court were without notice and would oppose the said proposed action by said departmental officers and the said Secretary Albert B. Fall and said Commissioner Charles H. Burke, as well as Anna Laura Lowe, Harold C. McGugin, A. J. Ward, and M. L. Mott, all well knowing that the laws, rules, and regulations as to the Secretary of the Interior, previously herein quoted, required said funds and bonds to be retained either by the officer of the department therein stated as the depository thereof, or in the hands of such other officers of the department as said Secretary might designate to the credit of said guardian and to be paid thereto as therein conditioned at the reasonable discretion of said Secretary and to no other person, the said Secretary Albert
153 B. Fall and the said Commissioner Charles H. Burke, cooperating and thereby intending to make an amendment to said rule and regulation as might enable said Secretary Albert B. Fall and the said Commissioner Charles H. Burke to carry out and consummate the said plan, purposes, and design of the said Anna Laura Lowe, said Harold C. McGugin, A. J. Ward, and M. L. Mott, and to authorize the said Secretary Albert B. Fall and said Commissioner Charles H. Burke to assume exclusive jurisdiction over and power and control of disposition of the said funds and bonds to the exclusion of said guardian and said County Court, and to authorize said Secretary to determine the competency of said Jackson Barnett and to confer upon himself the powers of a probate court in such matters, and well knowing that said rule as then existing did not so authorize, and to justify his acts in so

doing, did, on the seventh day of October, 1922, make and promulgate, as an amendment to said rule and regulation, the following, to wit:

"And provided further, That in such individual cases or classes of cases as the Secretary of the Interior may direct, the Superintendent for the Five Civilized Tribes shall cause such payments as may be authorized to be made out of the royalties and other individual Indian funds of the restricted Indians, minors, and incompetents, to be paid direct to the Indians entitled thereto or to be otherwise paid out for the benefit and use as the Secretary of the Interior may authorize in said cases."

154 13. That the said promulgated amendment to said rules and regulation was wholly void and without force and effect in that the same was not only not authorized by said acts of Congress, nor by any other acts thereof, but was contrary to the provisions, the purpose, and intent thereof, all as hereinbefore alleged, and the making thereof was an unwarranted, unlawful, and arbitrary act and an abuse of the limited discretionary powers conferred upon said Secretary of the Interior by Congress and in excess of his power and authority to make.

14. That after the promulgation of said amendment to said rule and regulation, and to wit, on or about the fifteenth day of December, 1922, the said Anna Laura Lowe, said Harold C. McGugin, A. J. Ward, and M. L. Mott, in furtherance of said plan, purpose, and scheme to defraud said Jackson Barnett and the United States of America, as alleged, and under assurances thereto theretofore made by said Secretary Albert B. Fall and his official subordinates and by the said Commissioner Charles H. Burke that said pretended request of said Jackson Barnett for approval of said Secretary Albert B. Fall to said pretended request would be granted and the said bonds accordingly assigned and delivered by said Secretary Albert B. Fall, did, with the intent, purpose, and plan of accomplishing and consummating said design and plan and of receiving said bonds, appear before said Commissioner Charles H. Burke and said Secretary Albert B. Fall, or his official subordinates, and did there pre-

155 sent the said pretended written request of the said Jackson Barnett, bearing his thumb-print-signature, and there and without notice to or knowledge of the said guardian and said County Court did request delivery of said bonds to the said Anna Laura Lowe from the said departmental officers, receiving thereat the assurances of said departmental officers that said request would be granted and the said bonds accordingly delivered. That thereafter and on, to wit, the first day of February, 1923, and while said Jackson Barnett remained under said decree, or judgment, of incompetency, and while he was incapable of knowing and understanding the nature, effect, and purport of the said transactions, matters, and things herein alleged, and without notice to his said guardian, and without knowledge thereof, and the said County

Court, all of which was to all said persons and departmental officers well known and understood, the said Secretary Albert B. Fall and his duly authorized Assistant Secretary F. M. Goodwin, joined, concurred in, and recommended by the said Commissioner Charles H. Burke, did then and there cause to be assigned and delivered to said Anna Laura Lowe, in the name of Anna Laura Barnett, by the said Secretary and the said Assistant Secretary and the said Commissioner, of five hundred and fifty thousand dollars ($550,000.00), par and face value, of said bonds, as follows:

U. S. first Liberty loan bonds, #220	$50,000.00
U. S. second Liberty loan bonds, #6708 to #6711, inclusive, $10,000.00 each	40,000.00
U. S. second Liberty loan bonds, #683	50,000.00
156 U. S. third Liberty loan bonds, #1256	5,000.00
U. S. third Liberty loan bonds, #17824 to #17832, inclusive, $5,000.00 each	45,000.00
U. S. third Liberty loan bonds, #16228 to #16236, inclusive, $10,000.00 each	90,000.00
U. S. third Liberty loan bonds, #102	50,000.00
U. S. fourth Liberty loan bonds:	
#1572 and #1573, $100,000.00	200,000.00
#8721 and #8722, $10,000.00	20,000.00

and to the said A. J. Ward, five hundred and fifty thousand dollars ($550,000.00), par and face value, of said bonds, as follows:

U. S. first Liberty loan bond, #245	$100,000.00
U. S. second Liberty loan bond, #682	50,000.00
U. S. second Liberty loan bonds, #6705 and #6707, inclusive, $10,000.00 each	30,000.00
U. S. third Liberty loan bonds:	
#101 and #103, each $50,000.00	100,000.00
#16222 to #16227, inclusive, $10,000.00 each	60,000.00
#17813 to #17823, inclusive, $5,000.00 each	55,000.00
U. S. fourth Liberty loan bonds:	
#1574	100,000.00
#666	50,000.00
#9964	5,000.00

157 no part of which bonds have even been returned to the said Secretary of the Interior nor to any officer of the United States.

15. That as to whether said Secretary Albert B. Fall, Assistant Secretary F. M. Goodwin, Commisioner Charles H. Burke, and any others of said departmental officers participating in the promulgation of said amendment to said rule and regulation and in the granting of said pretended request of the said Jackson Barnett to make said pretended gifts, and participating in the assignment and delivery of said bonds as alleged, did so with a fraudulent purpose of aiding and assisting the said Anna Laura Lowe, said Harold C. McGugin, A. J. Ward, and M. L. Mott in the accomplishment and consummation of their said plan, design, and scheme so to defraud the said Jackson Barnett and the said United States, intervenor is unable to aver, but intervenor does allege and aver that if not so thereby intended and done, and if not procured to be done thereby by the said Anna Laura Lowe, said Harold C. McGugin, A. J. Ward, and M. L. Mott, with a fraudulent purpose and

intent, the said acts nevertheless were so done in a reckless and wanton disregard of the rights of said Jackson Barnett and of the rights of his said guardian and the rights and jurisdiction of the said County Court having jurisdiction over the person and over said property and the estate of said Jackson Barnett, as well as the rights of the United States in the premises, as well as in a reckless and wanton disregard of the duty of the United States
158 toward said Jackson Barnett and his estate and property as a ward of the Nation, and in a reckless and wanton disregard of its national duty thereto, and all in such manner as to constitute same a fraud in law and equity against both the said Jackson Barnett and the intervenor, the United States of America. That the said acts of said officials of the Interior Department were not only in excess of their statutory powers and authority but were an unwarranted, unauthorized, and arbitrary abuse of their limited discretionary powers, constituting in law and equity a fraud against both the said Jackson Barnett and the United States, of which said facts, matters, and things the said Anna Laura Lowe, said Harold C. McGugin, A. J. Ward, and M. L. Mott at all times had notice.

16. Intervenor, however, alleges that the said representations so made by said Anna Laura Lowe, Harold C. McGugin, M. L. Mott, and A. J. Ward to the said Secretary Albert B. Fall, Assistant Secretary F. M. Goodwin, and Commissioner Charles H. Burke were false and at the time each thereof in making the same knew the same to be false and each made the same intending that said officers should believe, rely, and set thereon, said representations being false in that the pretended marriage between the said Jackson Barnett and said Anna Laura Lowe was a nullity by reason of the said incompetency and want of capacity of said Jackson Barnett to enter into a marriage contract; and because the said Jackson Barnett was abducted and caused to submit to said pretended marriage ceremony through fraud, coercion, undue influence, du-
159 ress, and force of the said Anna Laura Lowe, all overcoming his weak mentality, as hereinbefore alleged; and because the said pretended marriage was intended as a fraud and was a fraud against the said Jackson Barnett and the said County Court and said Carl J. O'Hornett, guardian, and the United States with respect to its governmental control of each over said Jackson Barnett and his property; that said representations were further false in that the said Jackson Barnett did then have a living relative, to wit, one David Barnett, a half brother; in that under the law of Oklahoma the fact of marriage did not operate to vest an undivided half or any other interest of the husband's property in the wife, nor to terminate the authority of a guardian over an incompetent person; in that the said Jackson Barnett did not know, understand, or comprehend the character, nature, or import of the said purported written request to the said Secretary to make

the proposed gifts of his property, nor the purported trust created by said Anna Laura Lowe under her assumed name of Barnett, did not know and understand that he was making a gift and disposing of his property; all of which representations, the United States alleges, but not on knowledge, but on assumption based upon the presumption of law that officers act honestly and in good faith, were at all times believed, relied, and acted upon by said departmental officers, although there was since March 2, 1922, on file in the office of said Secretary Albert B. Fall and Commissioner Charles H. Burke a voluminous official written report of the special supervisor of said department, made on April 28, 1920, to and
160 at the request of Cato Sells, the then Commissioner of Indian Affairs, which report, based on a personal investigation of said supervisor, disclosed that said Anna Laura Lowe for some ten years prior was a notorious character, of bad repute, engaging in adulterous relations in hotels in many cities in many States, as well as having the reputation of blackmailing men with whom she would so engage, said report further detailing the facts with reference to her kidnapping and marrying said Jackson Barnett, as are set forth in this petition, and further detailing activities of said Anna Laura Lowe immediately prior to her said pretended marriage, showing the same to have been intentionally brought about and procured for the purpose of defrauding the said Jackson Barnett and the United States, the fact of which report being so on file in said office and the contents thereof, intervenor assumes, was not brought to the attention of said Secretary Albert B. Fall, Assistant Secretary F. M. Goodwin, and Commissioner Charles H. Burke. However, intervenor, the United States of America, in the alternative, avers and alleges that if in any wise mistaken in its said assumptions and in the said averments thereon based, then that the said Albert B. Fall, the then said Secretary of the Interior, Assistant Secretary F. M. Goodwin, and Commissioner Charles H. Burke, in their several acts in the promulgation of said amendment to said rule and regulation and in the approval and the granting of the said pretended request of said Jackson Barnett to make said gifts and in their said acts in delivering and surrendering said bonds to the said Anna Laura Lowe and to the said A. J.
161 Ward, did so with the purpose of aiding, assisting, and abetting the said Anna Laura Lowe, said Harold C. McGugin, A. J. Ward, and M. L. Mott in the accomplishment of the said purpose, plan, and design to defraud the said Jackson Barnett out of the same and to defraud the United States of America in its governmental capacity, right, and duty in respect to the said Jackson Barnett, his person and his said property, all as hereinbefore alleged, all thereof so done in the face of the fact that under the management, direction, and control of the said guardian, Carl J. O'Hornett, and the said County Court, the said one million and one hundred thousand dollars ($1,100,000.00) had accumulated from said rents and royalties under said oil lease, and under the joint supervision

and control of said County Court and said guardian, the same had been preserved until so unlawfully and wrongfully diverted and converted by said departmental officers. That of the said bonds so delivered to said Anna Laura Lowe by said Secretary Albert B. Fall and his said subordinate departmental officials, the said Anna Laura Lowe did immediately thereupon and in fulfillment of the terms and conditions of said fraudulent agreement and conspiracies as herein alleged, assign and deliver to said Harold C. McGugin, or for his use and benefit and as his portion of the fruits of said fraud and conspiracy, one hundred and fifty thousand dollars ($150,000.00) par of said bonds, or the converted form thereof, and did deliver, or cause to be delivered, to said M. L. Mott fifteen thousand dollars ($15,000.00) par thereof, or the converted form of same, as his portion of said fruits of said fraud, and further and on said

162 day and without consideration and with full notice of the facts as to the delivery of said bonds, delivered to said Walter S. Keith thirty thousand dollars ($30,000.00) par of said bonds.

17. That immediately thereupon the said Anna Laura Barnett, under a purported trust agreement between herself and the Riggs National Bank, and concurred in and approved by said Secretary Albert B. Fall, Assistant Secretary F. M. Goodwin, and Commissioner Burke, and with full knowledge on the part of each thereof and of the said M. L. Mott and A. J. Ward, assigned and delivered to said bank two hundred thousand dollars ($200,000.00) of said bonds, and also under a purported trust agreement caused by her to be entered into between defendant The American Baptist Home Mission Society and defendant The Equitable Trust Company of New York, and under an agreement entered into between herself and said departmental officers, aided and abetted therein by said McGugin, Mott, and Ward, in furtherance of said fraudulent design, did cause the said five hundred and fifty thousand dollars ($550,000.00), par, bonds so delivered to said A. J. Ward, as hereinbefore alleged, to be delivered thereby to said American Baptist Home Mission Society, and thereby to the said defendant The Equitable Trust Company, for the purposes of said pretended trust, whereunder and of the income from said bonds a portion of said income during the life of said Jackson Barnett should be paid to the said Jackson Barnett and upon his death the said bonds to be delivered to and to become the property of said defendant The American Baptist Home Mission Society.

163 18. That in furtherance of the unlawful design and plan hereinbefore alleged, the said Anna Laura Barnett, aided and assisted by her said named associates, and with the fraudulent intent on the part of each thereof of impeding, interfering with, and defeating the United States in its governmental control and capacity, as hereinbefore alleged, and of impeding, impairing, and defeating the jurisdiction of said County Court of Okmulgee County and the said guardian thereby appointed, did cause and procure said Jackson

Barnett soon after the receipt of said bonds from said Secretary of the Interior, as alleged, to be taken to the State of California and there at all times detained in his incompetency and helpless condition and away from his friends and old associates and those calculated to protect his interests, and in furtherance of said plan did procure the appointment of the said Anna Laura Lowe as guardian of the person of said Jackson Barnett and the Security Trust and Savings Bank of Los Angeles as guardian of his estate, all by the Superior Court of Los Angeles County, California, on an application therein filed by said Anna Laura Barnett about July 22, 1924, wherein she represented said Jackson Barnett to be an incompetent, incapable of caring for his person and business, and praying the appointment of a guardian of his person and estate, in which proceeding and on which petition said court on July 29, 1924, did appoint said Anna Laura Barnett guardian of the person, and said Security Trust and Savings Bank guardian of the estate, of said Jackson Barnett, which said bank continued in said capacity until resigning its trust
164 on March 6, 1925, after which said court appointed, at the request of said Anna Laura Barnett, one Leslie R. Hewitt as guardian of the estate of said Jackson Barnett.

19. That in order to accomplish said purpose and to procure the appointment of said guardian, and further to effectuate said fraudulent design, the said M. L. Mott and A. J. Ward not only aided and assisted said Anna Laura Barnett in the preparation of her plans to cause said Jackson Barnett so to be removed from the jurisdiction of said Oklahoma courts, but said M. L. Mott did after the removal thereof go to the State of California and there aid, abet, and assist said Anna Laura Barnett by counsel and advice thereto in procuring the appointment of said guardian in California and thereby if possible to place the person and estate of said Jackson Barnett under the jurisdiction of the California Courts, and thus deprive said Okmulgee County Court of its further jurisdiction, and to defeat the purpose of the acts of Congress in creating and recognizing said County Courts in the said respects as having exclusive jurisdiction of incompetent and minor members of the Creek Tribe of Indians under the acts of Congress and the laws of the State of Oklahoma; that prior thereto said Mott, Ward, and McGugin, in furtherance of said fraudulent plan and agreement and for the purpose of causing all funds of said Jackson Barnett to be removed from the jurisdiction of Oklahoma, did induce, aid, advise, and assist said Anna Laura Barnett and said departmental officers to remove, and in the removal of the funds and property of said Jackson Barnett
165 then in the hands of the Superintendent of the Five Civilized Tribes of Oklahoma, to and into the custody and possession of said Secretary of the Interior at Washington, D. C.

20. After having so fraudulently invoked the jurisdiction of the Superior Court of California, as alleged, and after the procurement of the appointment of said Security Trust and Savings Bank as guardian of the estate of Jackson Barnett, the said Anna Laura Lowe,

in furtherance of said unlawful and fraudulent design and plan, aided and assisted by the said M. L. Mott, A. J. Ward, and Harold C. McGugin, and without the knowledge of said Oklahoma guardian and said County Court, did no October 8, 1924, procure a transfer of fifty-five thousand dollars ($55,000.00), par, of bonds, of said Jackson Barnett then in the hands of said Secretary of the Interior and so thereto transferred, to be by said departmental officers transmitted to said State of California to said Security Trust and Savings Bank of Los Angeles, and thereby received on November 7, 1924, and by said bank converted into cash, the said Anna Laura Barnett thereafter and within a period of some seventy (70) days, having obtained under said pretended guardianship proceedings for her own use and benefit in excess of twenty-four thousand dollars ($24,000.00) of said amount so transmitted, all of which she had at all times retained; that in addition in the same manner and by the same parties twenty-five thousand dollars ($25,000.00) additional funds and bonds were procured to be transferred from said Secretary of the Interior
166 to the said Leslie R. Hewitt on or about the twenty-eighth day of July, 1926, all thereof being done by the said-named parties and departmental officers with full knowledge of all the facts, matters, and things hereinbefore alleged and of the said fraudulent purpose, plan, and design, all of which acts of said departmental officers were without authority of law, contrary to law and in excess of the powers and authority thereof, all in the manner as in this petition alleged.

21. That no part of said funds, money, bonds, or income has been returned to said Secretary of the Interior, and particularly no part of said five hundred and fifty thousand dollars ($550,000.00) of bonds have been returned by said American Baptist Home Mission Society or by said Equitable Trust Company of New York, defendants herein, and all thereof have at all times since been retained and are now retained thereby and in the possession thereof, each of whom having refused to return any part or portion thereof to the said Secretary of the Interior. Intervenor alleges that a number of said bonds, if not all thereof, delivered to defendants herein, show a receipt upno their face that same were issued to the Secretary of the Interior for the use of Jackson Barnett as an incompetent expressly so designating his incompetency on the face thereof, and all of the officers and agents of said defendants at all times well knew and understood that said Jackson Barnett was in fact an incompetent as well as by judicial determination and incapable of acting in the premises by reason thereof; that all of said matters, things, acts, and transactions complained of were unlawful, null, and void,
167 and all thereof done and performed in furtherance of said original plan, design, and scheme to defraud not only said Jackson Barnett but the United States, all as in the manner alleged.

Intervenor avers that it is entited to an accounting herein as against said defendants and entitled to a decree in this court decreeing said pretended trust agreement to be wholly null, void, and of

no effect, and entitled to a decree of this court impressing a trust upon all of the property so in the hands of defendants or either thereof accruing by, through, or under said pretended trust, together with the income therefrom for the use and benefit of said Jackson Barnett, and a decree requiring the surrender and return thereof to the Secretary of the Interior to be by him held and retained as in manner by law required.

For as much, therefore, as intervenor is without adequate remedy at law and can have relief only in a court of equity where matters of this kind are cognizable, it prays:

First. That defendants and each thereof be required to answer this petition of intervention, but not under oath, answer under oath being expressly waived.

Second. That defendants each be required to answer herein, disclosing fully by description, number, and amounts the said United States Liberty bonds, respectively, received by it under said pretended trust agreement, and further showing by specific description any securities or property into which the same or any part of said bonds have been converted, if at all, and fully and in all
168 respects to account for the income therefrom, and that the court herein decree that all thereof to be the property of said Jackson Barnett, and that the pretended title of the defendants therein be decreed to be in trust for the use and benefit of said Jackson Barnett, and that the same be by decree of this court required to pay and deliver to the said Secretary of the Interior to be by him retained and held to be disposed of only in manner as by law provided.

That said pretended declaration of trust so entered into between defendants and all agreements between either of defendants and said Anna Laura Lowe, if any, with reference to said property so involved in said trust agreement, be adjudged and decreed to be null and void and the same set aside, canceled, and held for naught, and that all of said properties be adjudged and decreed to be the property of Jackson Barnett, and that the intervenor, United States of America, have all further, other, special, and general relief to which it is entitled under the circumstances and facts of this case as in equity and good conscience may seem just and proper.

JOHN G. SARGENT,
Attorney General of the United States.
By B. M. PARMENTER,
Assistant Attorney General.
By CHARLES B. SELBY,
Special Assistant to the Attorney General.
By EMORY R. BUCKNER,
United States Attorney for the Southern District of New York.

169 [*Duly sworn to by Charles B. Selby; jurat omitted in printing.*]

170 In United States District Court

Statement at trial withdrawing certain allegations

AMENDMENT MADE IN OPEN COURT TO THE AMENDED PETITION OF INTERVENTION OF THE UNITED STATES OF AMERICA, INTERVENOR-APPELLANT

Mr. CRAWFORD. I desire to withdraw on behalf of the intervening petitioner, the United States, each and every allegation of the amended petition of intervention wherein it is alleged in substance or in effect that the then Secretary of the Interior, Albert B. Fall, and the then Commissioner of Indian Affairs, Charles H. Burke, willfully and knowingly cooperated with Anna Laura Lowe, Harold C. McGugin, A. J. Ward, and M. L. Mott in the accomplishment and consummation of their plan, design, scheme, and conspiracy to defraud Jackson Barnett and the United States; and each and every allegation in the said amended petition that the said Secretary of the Interior, Albert B. Fall, and the said Assistant Secretary, F. M. Goodwin, and the said Commissioner of Indian Affairs, Charles H. Burke, in promulgating the said amendment to Regulation No. 24, and in granting the pretended request of the said Jackson Barnett to make his pretended gifts, and in participating in the assignment of Liberty bonds of the said Jackson Barnett, all as appears more fully in the said amended petition of intervention, did so with the fraudulent and illegal purpose of aiding, abetting, and assisting the said Anna Laura Howe, Harold C. McGugin, A. J. Ward, and M. L. Mott in the accomplishment and consummation of the said plan, design, scheme, and conspiracy to defraud Jackson Barnett and the United States.

We wish to amend the amended petition of intervention by
171 withdrawing all of those allegation therein contained wherein it is alleged in substance or in effect that the amendment to Regulation No. 24 promulgated by the Secretary of the Interior, under acts of Congress approved April 24, 1906, May 27, 1908, and February 14, 1920, which said amendment was made and promulgated on the 7th day of October, 1922, was wholly void and without force and effect in that the same was not only not authorized by any act of Congress, but was contrary to the provisions and to the purpose and intent thereof, and that the making of such amendment was an unwarranted, unlawful, and arbitrary act and an abuse of the limited discretionary powers conferred upon the Secretary of the Interior by Congress and in excess of his power and authority to make.

172 In United States District Court

[Title omitted.]

Patterson, Eagle, Greenough & Day, solicitors for plaintiff (Carroll G. Walter and Rayburn L. Foster, and Cochran & Ellison and McCrory & Monk, of counsel).

Murray, Aldrich & Roberts, solicitors for the Equitable Trust Company of New York (A. M. Stackhouse, of counsel).

Charles S. Fettretch, solicitor for American Baptist Home Mission Society (Charles B. Rogers, Philip P. Campbell, and L. O. Lyttle, of counsel).

Emory R. Buckner, United States attorney, solicitor for intervenor (Thomas J. Crawford, Alvin McK. Sylvester, Charles B. Selby, and Nat. M. Lacy, of counsel).

Opinion of Knox, D. J., on final hearing

173 KNOX, D. J.:

For the purposes of this case, it may be assumed that the Secretary of the Interior had power and authority to remove the restrictions which the Congress of the United States has placed upon the property of Jackson Barnett, as a full blood Indian of the Creek tribe and to approve such gifts and donations of his property as he, in fact, made. But such approval, however honest and disinterested it may have been, can not give validity to a gift or donation which the apparent donor did not make, and which, by reason of mental incompetency, he was incapable of making. (Jennings v. Wood, 192 Fed. 507; Kendall v. Ewert, 259 U. S. 139.)

The record now before the Court is of great volume, and it would be a laborious task to summarize all the details of the amazing set of facts that seem to me to compel a conclusion that the instruments under attack should be set aside. By reason of this my recital of the matters by which I am convinced of Barnett's mental incompetency will be as brief as they can understandingly be stated.

Here is an illiterate Indian, now in the neighborhood of seventy-seven or seventy-eight years of age, who, until he became wealthy, was allowed to shift for himself and to eke out an existence as best he could. This he did in a more or less haphazard way until oil was found upon his allotment of land in Oklahoma. From that time until the present he has been the shuttledore in a game of battledore in which the stakes were high. Solicited and importuned for donations, to which he readily affixed his thumb print for
174 most anyone who asked it; kidnapped and married by an adventuress; harassed and annoyed by her attorneys and their allies, who enlisted the support of officials of the Government, and who were probably convinced of the justification of their subsequent action, he was finally induced to assent to part with Liberty bonds in the vast sum of eleven hundred thousand dollars. To the credit of the persons engaged in the transaction, it must be said that under the terms of the gifts thus made and the trust agreement executed provision was made for a substantial and sufficient life income to Barnett. But, even so, and admitting that the object of the trust created for Bacone University is a worthy one, and that Mrs. Barnett, so far as is known, has been a good wife to the Indian, the provisions for his support, which are contained in the several instruments of gifts and in the trusts, will not suffice to lend countenance to the ravishment of property rights that here occurred, nor warrant

officials of the Government in substituting their judgment for that which Barnett was unable to exercise.

The witness Mason, who testified to a conversation had with McGugin, the attorney for Mrs. Barnett, on an occasion in 1921, when he met him, Jackson Barnett, and his wife in an automobile, has been twice convicted for unlawful sales of whiskey, and is not friendly to McGugin. His evidence must, in consequence, be considered with these circumstances in mind. Nevertheless, a part of what he told was corroborated by subsequent events, and that was this:

"'I see,' said Mason, 'you are giving the old man a little
175 air.' 'Yes,' replied McGugin, 'we are airing him out in the car; we are going to air him out of some money.'"

The prophecy came true in the consummation of the transactions now before the court. The extent of the "airing" was that Mrs. Barnett received Liberty bonds in the amount of $550,000, with a part of which she created a trust for Barnett and turned over to McGugin, as his portion of the distribution, bonds worth $125,000 or perhaps a larger sum. At the same time, and in an effort to make this transaction palatable, a deserving charity was remembered to the extent of $550,000. It is to this gift that the present suit relates.

In considering Barnett's mentality, it is pertinent to give some attention to his proclivity in making donations. In the files of the Department of the Interior there is an undated letter, thumb-marked by him, in which he donates $1,000,000 for a hospital in or near Henryetta, Oklahoma, $150,000 to be applied to the acquisition of land and the erection of buildings, the balance to be utilized for an endowment of the institution. Under date of February 11, 1920, Barnett authorized the following gifts to be made out of his restricted funds:

Indiana Orphan Home, at Bacone	$50,000
Orphans' Home, near Oklahoma City	50,000
M. E. Church, South Henryetta	25,000
Christian Church, Henryetta	25,000
Catholic Church, Henryetta	25,000
Nazarene Church, Henryetta	25,000
First Presbyterian Church, Henryetta	25,000
Episcopal Church, Henryetta	25,000
Silver Springs Indian Church	10,000
176 Indian church, near Holdenville	2,500
To the Baptist Church denomination for the work designated in the donation itself	200,000
	462,000

Jackson's thumbmark to these proposed gifts, together with one of $1,000,000 for the hospital, were obtained by a man named Casey at the suggestion of two others named Cameron and Burroughs, respectively. Casey accomplished his purpose as a result of having frequently gratified Barnett's taste for egg-malted milk and by telling him that his contribution was wanted to build a hospital. The paper was not read over to the Indian, and Casey justifies himself for not having done so by saying that Barnett could not have under-

stood it. Had these gifts been consummated, Casey, Burrough, and Cameron were to have received $105,000. In this connection, it is only just to say that Cato Sells, who first suggested that Barnett donate $1,000,000 for the purpose of building a hospital, was not to share in the commissions to which Casey testifies were to be paid. Mr. Sells was sincere in his desire that a hospital for Indians be erected, and believed himself to be warranted in having Barnett furnish the funds for doing so. The project, however, did not materialize. One reason was that within a week or two the present Mrs. Barnett, then Mrs. Lowe, appeared on the scene, and after several vicissitudes succeeded in carrying Barnett to Kansas, where they were married. To make assurance doubly sure that they were legally wedlocked, she then took him to Missouri, where a
177 second marriage ceremony was had. A few days after the first ceremony Barnett thumbmarked a letter, in which he rescinded the foregoing authorized gifts. He was then under the dominance of his wife and her attorney, McGugin. But some time afterwards, on December 18, 1920, Casey succeeded in getting Barnett into Cameron's office in Henryetta and had no difficulty whatever in having the Indian repudiate his rescission of the gifts proposed in the original Casey document and by a new authorization reinstate the same as an expression of his wishes and desires. The instrument last executed was sent by Cameron to the then Commissioner of Indian Affairs, but that official, although deeply interested in the hospital project, failed to approve the gifts, and they were not made.

Thus matters remained for a period of six months. Meanwhile, the administration of the National Government changed, and there was a new Commissioner of Indian Affairs and a new Secretary of the Interior, and in July of 1921 overtures for withdrawals of Barnett's money were made to them. Cameron, in company with a delegation of Baptist ministers and in possession of a letter of introduction from a man named Motter, a special assistant to the recently installed Attorney General of the United States, called on Indian Commissioner Burke, seeking his approval of the donation of $200,000 theretofore attempted to be made by Barnett. The solicitors for funds were requested to initiate the request through the office of Victor M. Locke, jr., who was then superintendent of the Five Civilized Tribes. Burke then wrote to Locke and said, inter alia:

178 "I take it for granted that one of the first steps would be to have it (the proposed donation) referred to Mr. A. J. Ward, the Creek tribal attorney, with a request that he express an opinion as to the legal questions that may be involved."

This course was pursued, and on September 24, 1921, Locke forwarded a memorandum prepared by his law clerk and another prepared by Ward. In the letter of transmittal Locke called attention to the fact that Barnett had been adjudged an incompetent by one of the courts of Oklahoma and that he had a guardian. The reports of his law clerk and that of Ward had dealt with the relationship

between the department and the probate courts of Oklahoma, and had recommended, in view of resulting questions of law and policy, that the gift be not approved. In this opinion Locke concurred. It was near this time that McGugin met the special assistant to the Attorney General, who had introduced Cameron to Burke. Very shortly thereafter a petition was prepared and sent to Burke, in which Barnett's Oklahoma guardian was taken to task for the niggardly and unsatisfactory manner in which he looked after the needs of the Barnett family. It was asked that the Indian and his wife, accompanied by Motter, should be permitted to go to Washington for a conference with the commissioner and that the sum of $2,500 be allowed for the purpose. The trip was promptly authorized. Difficulty, however, was experienced in securing the approval of Barnett's guardian and the county judge of Okmulgee County to sign a voucher for the expenses of the trip. The United
179 States probate attorney was brought into the situation, and he advised the commissioner of his belief that Barnett knew nothing of the petition, and that he had no desire to go to Washington, and that, in the attorney's opinion, the whole plan was a scheme of McGugin and Mrs. Barnett to get some of the Indian's money. Nevertheless, the county judge finally approved the voucher for the funds that had been requested, notifying the commissioner that he had done so in a spirit of desiring to cooperate with the department, but asking that he be advised of any proposed donations or investments of Barnett's funds that would require action by this court. It was not long before Motter, McGugin, and the Barnetts were in the anteroom leading to the office of Commissioner Burke. Coincident with their presence, M. L. Mott, former Creek attorney, an old acquaintance of Burke and favorably disposed towards donations by wealthy Indians to worthy charitable and educational objects, happend to be present. In fact, he testified he had expressed his views on this subject to the commissioner a day or two previous to the arrival of the party from Oklahoma. It likewise appears to be the fact that Mott suggested to Burke that if Motter should be interested in the affairs of the Barnetts an embarrassment, due to Motter's connection with the Department of Justice, might arise. Burke, thereafter, spoke to the special assistant to the Attorney General about this feature of the case and he, apparently, stepped out of the situation.

The Washington conference with the commissioner seems to have been confined to a general talk about the needs and desires of the Barnetts with particular reference to the alleged obstacles
180 that were being placed in their way by the unfriendly attitude of the Oklahoma guardian and the court which appointed him. Burke, however, did say that if Barnett made any disposition of his estate, it was his (Burke's) hope that it would be beneficial to his tribe. On the return trip to the west McGugin and Mott were on the same train, and they took occasion to discuss the affairs of Barnett. According to Mott, he said to McGugin:

"I don't think you are following the case in the right way; I think you ought to take the position that the probate court has no control whatever over the funds of a full-blood restricted Indian, whether he is competent or incompetent, if it is in the hands of the Secretary of the Interior * * *"

It seems that there was also some discussion about the possible creation of trusts of Barnett's property.

On September 28 Burke wrote to the superintendent of Five Civilized Tribes with reference to the Barnett case. After expressing his views as to how Indians should be protected from designing persons and commenting upon the luxuries to which Barnett was entitled as a man of wealth, he went on to say that Locke's suggestion with reference to Barnett's making a disposition of his estate so that the Creek Nation would be the beneficiary for educational purposes was one that would meet with his hearty approval. He also said that Barnett should make ample provision for his wife and any immediate relatives that he might have. And, further, that
181 it would be gratifying if he would recognize some local institutions if he were so disposed. Burke went on to state that he would, for the present, withhold his approval of the proposed donation of $200,000 to the Baptist Church fund which was urged by Rev. Cameron. From that time on until well into the following year there was a series of communications passing back and forth between Washington and the various governmental agencies in Oklahoma. These dealt particularly with the guardianship situation and the fact that considerable feeling had been aroused between the department and the Oklahoma Probate Court, which had resulted in considerable publicity.

In July of 1922 the disposition of $1,100,000 belonging to Barnett began to take definite form, especially after the Solicitor of the Interior Department had rendered an opinion to the Secretary as to the extent of the latter's authority over the restricted funds and property of full-blooded Indians. The opinion was that the Secretary might act independently of both the probate court and the guardian whom it had appointed of the property of Barnett, an incompetent restricted allottee, and that he, the Secretary, was not limited or restricted in the control or disbursement of restricted funds of individual Indians of the Five Civilized Tribes, nor could he be so restricted by the order of any probate court or by its failure or refusal to act in the premises.

Thereupon, the commissioner recommended that the rules that had long been in force with respect to the restricted property of full-blooded Indians be amended, and wrote to the Secretary in part as follows:

182 "It has been found that in some cases the payment to the guardians of restricted Indians of money out of the restricted funds of such Indians would not be to the best interest of the Indians. In view, therefore, of the above-mentioned approved opinion of

Solicitor for the Interior Department, I recommend that section 24 of the above-mentioned department regulations be amended by the addition to said Section 24 at the end thereof of the following paragraph:

"'And provided further, that any such individual cases or classes of cases as the Secretary of the Interior may direct the superintendent for the Five Civilized Tribes shall cause such payments as may be authorized to be made out of the royalties and other individual funds of the restricted Indians, minors, and incompetents, to be paid direct to the Indians entitled thereto or to be otherwise paid out for their benefit and use as the Secretary of the Interior may authorize in said cases.'"

This proposed amendment was speedily adopted and became a part of the departmental rules and regulations.

In the latter part of November, 1922, McGugin, Ward, and Mott were again in Washington, and McGugin remained there until February of 1923. From time to time some negotiations were carried on with the department in respect to a purchase of a farm for the Barnetts near Coffeyville, Kansas. Nothing came of this project. But, according to McGugin, in one of his conversations with Burke the latter said:

183 "What would be the attitude of you, as attorney for Mrs. Barnett, toward a distribution of a part of this estate to some worthy charity, and taking care of Barnett, rendering him secure?"

In reply, McGugin said that Mrs. Barnett had never been adverse to a part of the estate going to such a charity, but it was her desire that whatever was given for that purpose should be for the benefit of the Indians, and that this was Barnett's desire as well as her own. McGugin went on to say to Burke that it had never been the desire of Mrs. Barnett or himself to try to "hog" the estate unreasonably, and that Mrs. Barnett should not have anything except what was a fair share. Further, he called attention to the fact that Barnett had already made two wills in which he had made liberal provision for Indian charities. McGugin informed the commissioner that Mrs. Barnett would be opposed to any gifts to take effect during the lifetime of Barnett unless, at the same time, she was made a gift in some reasonable amount. The commissioner said that the restrictions by which Barnett's property was burdened would probably be released in 1931, and if the Creek died before that year there would be endless litigation concerning his estate, and that, therefore, he would like to see at least a part of his property placed where it would be of lasting benefit to the Indians. He went on to say that if some plans could be worked out in figures which would be satisfactory to the department and which met with the wishes of Barnett he was willing and ready for the department to make some distribu-

184 tions from the estate. At this, McGugin and Ward went into an anteroom and talked over the details of distribution as should be made. Ward, it appears, called attention to the fact that

several Indians had made gifts to Bacone College, which was under the jurisdiction of the American Baptist Home Mission Society, McGugin observed that while he had never talked about such a matter with Jackson and his wife other than upon the occasion when he drew the Indian's will, he had no doubt that Bacone University would be a desirable agency to receive the money and to distribute it for the benefit of the Indians. It is probable that at this conference the amounts to be distributed out of Jackson Barnett's funds were first seriously discussed, Ward proposing that the school be given $700,000 and that Mrs. Barnett receive $400,000. This division of the funds did not appeal to McGugin as being a suitable provision for Mrs. Barnett. Nevertheless, then, and at later times, Ward insisted that the division should be $700,000 to the school and $400,000 for Mrs. Barnett, giving McGugin to understand that these figures would meet with the approval of the department and that it would not approve anything else.

So matters continued, and McGugin had with reluctance about reached the conclusion to accede to Ward's position. But, before doing so he again came into contact with Mott, to whom he related the status of the pending negotiations. Mott made the suggestion that the department was in mighty poor business in giving the woman any money except such an amount as she would inherit if Barnett died without a will. He proceeded to state that—

185 "The department has recognized that woman as the dutiful wife of Jackson Barnett, and there are no circumstances justifying or excusing them from even giving her a penny less than one-half—just what she would inherit if Jackson Barnett died intestate."

The matter had not been placed before the department in that light, but the following day McGugin hastened to do so. He conferred with both Burke and Ward, with the result that they went into conference, and at its conclusion McGugin was advised that the department would not be adverse to placing its approval upon a distribution of one-half of the Indian's estate for the benefit of Mrs. Barnett and one-half for the benefit of Bacone University, provided such plan met with the sanction of Mr. and Mrs. Barnett and if the details could otherwise be satisfactorily worked out. McGugin lost little time in wiring to the Barnetts to come to Washington.

In passing it is to be observed that so far this plan had not been suggested to the man whose funds were thus to be distributed.

McGugin was well satisfied with the successful outcome of his negotiations at the department, and that night he again saw Mott. So happy was he at what had transpired that he voluntarily picked up a piece of paper on which he inscribed the following:

"Whereas there is under consideration in the Department of the Interior the possibility of my husband giving me $550,000, and such gift being approved by the Department of the Interior, as
186 and when that gift is consummated, if consummated, I agree to give to M. L. Mott, $15,000."

He signed it "Anna Laura Barnett, by Harold McGugin." The paper was given Mott, and when Mrs. Barnett received her bonds and had transferred a part of them to McGugin in payment of his fee he discharged the obligation of $15,000 he had given to Mott.

In compliance with the request contained in McGugin's telegram, Barnett and his wife, accompanied by a man named Keith, went to Washington, and on December 15, 1922, Jackson Barnett placed his thumb mark on the authorization that resulted in the instrument that plaintiff seeks by this suit to set aside. It is unnecessary, I think, to cite all the details that led to the final execution of the formal instrument, but for a moment let some inquiry be made as to the extent of Barnett's knowledge of what was going on.

He received no information from either Mott or McGugin. There is no evidence that Burke gave him an explanation of what was in prospect or of what the result would be. If Mrs. Barnett took up the matter with her husband, the record is barren of proof of the fact, for she did not choose to testify. The work of informing Barnett seems to have been left to Ward. He said he had three or four conversations of fifteen to thirty minutes each with Barnett about the proposed gifts. The talks were had in English, and the most definite statement of Barnett's understanding of the matter that the witness was able to give was that when he signed the instrument, and that he asked Barnett:

187 "'Now, Jack, I would like to know what your understanding of this is,' and he says, 'My wife he get half, and the Bacone School get half.' 'Well,' continued Ward, 'Is that all?' 'Well,' said Barnett, 'I get money as long as I live.'"

Previous discussions of the subject were, to use Ward's words, "monosyllabic." In the manner described a king's ransom was transferred from its rightful owner to the donees under the documents that now engage the attention of the court.

In addition to the revelation of Barnett's mental capacity as revealed by what has already been said, the record contains a considerable quantity of testimony given by various witnesses who have known the Indian for a number of years and who have formed opinions as to his intelligence and mental competence as a result of their contacts with him. The evidence given by these witnesses is in conflict; those of the plaintiff declare Barnett's incompetency and those of the defendants believe him to have been fully capable of understanding the effect and purport of the instrument to which he affixed his thumb mark.

At the trial none of the litigants saw fit to call Barnett as a witness. Being desirous of forming some judgment of his mental capacity from my interrogation of him, I called him to the stand. At the time of doing so each litigant conceded upon the record that the Indian did not understand the nature of an oath. He was, therefore, not sworn.

From his answers to the questions put to him I gained a distinct impression that he is a harmless, kindly, mentally undeveloped

188 man who was extremely bored at the court proceedings and had no comprehension of their significance. He was able to impart information as to where he lived, as to the number and type of his automobiles, and that he was possessed of several cow ponies. He knew how long he had been in New York in connection with the trial, gave the name of the hotel at which he was stopping, and expressed some idea of the location of one of the restaurants at which he procured his meals. He was aware, too, of his ownership of a farm of about seventy acres, and that he had another piece of property on which there was an oil well. Also, that money came to him from the oil well, but he did not know the amount of his income. When asked if he had any idea of a million dollars, he answered, "No." Nor could he tell what might be done with that sum of money. Being interrogated concerning schools in Oklahoma, he replied:

"Yes; there are lots of them out there * * * there is a blind school out there, and some Bacone School."

When asked what he liked about Bacone School, he said he did not know. He could remember having been to the school, which had a lot of buildings and where there were a good many Indians. He was then asked if he wished to do something for Bacone School, and his answer was:

"I don't know. When I die; I ain't dead yet."

At this point it is well to quote the questions propounded by the court, together with the answers made by the Indian:

189 "Q. What do you want to do with that school when you die?

"A. Well, they say they are going to let them have the money.

"Q. That is what who said?

"A. McGugin.

"Q. To let them have the money when you die?

"A. Yes.

"Q. And what about the money while you are alive?

"A. I am going to keep it and eat off it.

"Q. What was that?

"A. I am going to keep it and eat off it all the time while I live.

"Q. Do you know where that money is now?

"A. No.

"Q. Did you ever make a gift to this school, sign any papers about the school, giving them the money after you died?

"A. I do not know.

"Q. Do you remember having signed any papers?

"A. I do not know.

"Q. Well, would you like to give some money to some school here in New York for children?

"A. I do not know.

"Q. Well, if there was a good school here in New York to take care of poor children?

"A. Yes.

"Q. Would you like to help that school?

"A. I do not know.

"Q. Would you like to do something for some hospital here in New York where they take care of poor children? Would you like to give some of your money when you die to some school or hospital here in New York?

"A. Nodding affirmatively.

"Q. You would?

"A. Yes; when I die.

"Q. Do you like children?

"A. Yes.

"Q. Do you want to do something for Indian children?

"A. What?

190 "Q. Do you want to do something for Indian children?

"A. When I die that is what they say.

"Q. What was that, when you die they say?

"A. Yes.

"Q. Would you like to do something for Indian children now if you did not need all your money; would you like to give some of your money to help Indian children?

"A. I do not know."

On further examination, the witness recalled both Commissioner Burke and his predecessor, Commissioner Sells. He could remember that he saw the latter in Muskogee, and later in Washington and that Sells wished him to give money to a hospital. He was asked what Sells said to him about a hospital and his answer was:

"He said I ought to put up a hospital out there, and I told him no."

He said he thought Sells asked for about a million dollars and that he would have put it up but that there was not so much sickness at that time. He disclaims ever having told Sells that he would build a hospital and by a negative nod answered that he did not put his thumbmark on a paper for the erection of a hospital. When asked as to what McGugin said about Bacone School, he said:

"Well, nothing. He said when I die I am leaving to the Bacone School children to have the money."

Barnett was then asked what he said. The reply was:

191 "I told him I think I will go ahead and come back, and asked him the same thing, and when I died I could not have nobody; I would have to let him take it up when I died."

Asked if he had ever been in court, he said, "No," but he remembered having talked to a judge in Coffeyville. He said that he had never spoken to any other judge, and at the present examination declared that he did not know that he was talking to a judge. He recalled certain persons who visited him in California some time prior to the trial and could remember his marriage. When dependent upon his own resources, he had been able to save about 100, and stated that he had owned some horses and a cow and chickens,

together with some beef cattle which he sold. He was able to tell what it cost to stay at his hotel in New York and to give some idea as to the purchase price of his clothes. Also, that his house and farm cost about $30,000. He did not know, however, whether it would cost one thousand dollars to go from New York to his home in Los Angeles. When asked if he knew how much money would go to Bacone School from his gift to that institution, he answered:

"Well, I do not know; I have to use that money to eat. I am living yet."

When asked if he knew how much money Bacone School would get after his death, he replied:

"Well, yes; but they are not getting that while I am living yet."

He then said that he did not know what the amount would be.

This inquiry was then made:

192 "Well, can you not tell me anything like what it would be?"

He answered:

"I do not know. About fifty or twenty-five."

When inquiry was made as to whether he knew the difference between $100 and a thousand dollars, he said, "Yes," and answered that "$1,000 was more than a hundred and that a hundred is not quite a thousand." He could not tell, however, how far short of $1,000 a hundred dollars is. He also knew that $100,000 is a larger sum than $1,000. He believed that $7,500 is a greater sum than $100,000, but could not tell whether $500,000 was more than $100,000. As to his talks with McGugin in Washington, the witness declared that he did not say anything, and then added:

"I told him that I would not like to have Bacone School. When I died I would let them have the rest of the money."

When asked if his wife was to receive any money, he said:

"No; never figured on her."

He said that he did not talk to Ward about Bacone School. Asked as to the amount of money he would like to have to eat with and for his own use over the period of a year, he said he did not know, but finally added, in answer to questions, that $50 would not be enough and did not know if $1,000 would be sufficient.

193 He remembers having given some money to a Baptist church in Henryetta, but could not tell the amount. Outside of some details as to his immediate personal desires and wants, he was unable to express any intelligent conception of what had been done with his property or of what action he had taken in connection with it.

From all the evidence in the case, I am strongly of the opinion that the gifts which purport to have been made by Barnett can not be regarded as his acts and deeds, and must be held to be void and of no effect. The alleged donor had no real comprehension and understanding of what he was induced to do, and thus was without that clear and unmistakable intention to part with his property which is, as I understand the law, an essential requisite of a gift

inter vivos. (Snavely v. Henderson, 204 Fed. 978, and cases cited in 28 C. J. 627.) It is impossible for me to think that Barnett had any more appreciation or concern for the welfare of Bacone University than was felt by someone of his ancestors who passed to "the happy hunting grounds" of legend long before he was born. That he knew the value and extent of his property, or conceived the nature of the provisions for himself in the trusts that were created, appeals to me as incredible. While he is not insane and is not an idiot, his intelligence is so stunted and undeveloped that he lacked the capacity to know what he was doing. In consequence of this, and as stated at the outset, there was nothing upon which the approval of the Secretary could operate, and his acts in the premises were a nullity. Whatever may have been his authority to release restrictions upon Barnett's property, and admitting the hon-
194 esty of his belief and that of his subordinates that the arrangements made were for the Indian's benefit, he was without authority, as were Burke, McGugin, Ward, and Mrs. Barnett, to appropriate and give away property to which they had neither title nor power of disposition.

As the instrument under which Barnett's funds were removed from the custody of the Secretary of the Interior was and is invalid, the defendants, both of which were put on notice of the Indian's incompetency and the gifts having been without consideration, can take no property or beneficial interest therein, and must be found to hold the same, together with the interest thereon, for the benefit of the rightful owner of the property. Each of the defendants will be required to account for their possession and control of the property, its income and proceeds that came into their hands, and to turn over the whole thereof to the Secretary of the Interior to be held by him as property of the said Jackson Barnett under and pursuant to the acts of Congress relating thereto.

Since this case was tried, the appointment of Elmer S. Bailey as guardian of the estate of Barnett, heretofore made by one of the courts of Oklahoma, has been set aside, but without an adjudication that he is or was competent at the time of the appointment. Such fact does not impair the right of plaintiff, as prochein ami, of Barnett to maintain this suit. In any event, the United States, as intervenor, may have the relief which will be accorded by the decree. The question of the right of the United States to be here as intervenor has been previously passed upon and will not again be considered by this court.

195 In conclusion, and as bearing upon Barnett's competency, it is fitting to observe that shortly after the gifts with which this opinion has dealt he was, at the instance of his wife, declared to be incompetent by a court of California, and guardians of the person and estate were there appointed. In view, however, of the fact that the property of Barnett in the hands of the present defendants should not have been removed from the custody of the Secretary of

the Interior under the circumstances then presented to him, I think the same should be returned to the custody of that official, and there is no necessity to deal with the question of the relative rights thereto of the Secretary and the guardian of Barnett, who may at any time have been appointed by either of the States of Oklahoma and California.

August 9, 1927.

JNO. C. KNOX, *U. S. D. J.*

196 In United States District Court

JACKSON BARNETT, A MENTAL INCOMPETENT, BY ELMER S. Bailey, his prochein ami, plaintiff
AGAINST
THE EQUITABLE TRUST COMPANY OF NEW YORK AND THE American Baptist Home Mission Society, defendants. | E-31/91
UNITED STATES OF AMERICA, INTERVENOR

Final decree

November 21, 1927

This cause regularly came on to be heard and was tried on the 16th, 17th, 18th, 19th, 22nd, 23rd, and 24th days of November, 1926, and was argued by counsel; and the court having delivered its opinion on August 9, 1927, holding that the defendants can take no property or beneficial interest in the bonds transferred to them as set
197 forth in the pleadings herein, and must be found to hold the same, together with the interest thereon, for the benefit of the rightful owner thereof, and requiring the defendants to account for their possession and control of the property, its income, and proceeds, and the defendant trust company having thereafter filed its account as required by said opinion, and the parties having agreed to accept said account without having the cause referred to a master and the account taken and stated by him;

Now, upon consideration thereof, it is ordered, adjudged and decreed as follows:

1. That the gift, transfer and assignment to the defendants of the $550,000 par value of United States Liberty loan bonds set forth in the pleadings herein, and the trust agreements therein set forth with respect thereto, be and the same hereby are declared to be null and void, and such transfer, gift, and assignment and such trust agreements are hereby set aside, and said bonds and the income and proceeds thereof are hereby declared to be the property of Jackson Barnett, to be held by the Secretary of the Interior of the United States for him under and pursuant to the acts of Congress relating thereto, and the defendants are found and adjudged to have no property or beneficial interest therein.

2. That the defendant The Equitable Trust Company of New York be and it is hereby directed, subject to the next succeeding paragraph hereof, to transfer and deliver to the Secretary of the Interior of the United States, to be held by him as property of the said Jackson Barnett under and pursuant to the acts of Congress
198 relating thereto, the following described property, which appears from its said account to be now in its possession, to wit:

$155,000 par value United States of America 4th Liberty loan 4¼'s, due October 15, 1938;

$100,000 par value United States of America 1st Liberty loan 3½'s, due June 15, 1947;

$80,000 par value United States of America 2nd Liberty loan converted 4½'s (exchanged for 2nd 4's originally received);

$216,000 par value United States Government 4's, due December 15, 1954;

$108,000 par value United States of America Treasury notes 4½'s, due December 15, 1927;

$777.27 in cash,

That the account heretofore filed with this court by the defendant The Equitable Trust Company of New York, be and the same hereby is approved and that upon the transfer and delivery of the above-described property to the Secretary of the Interior of the United States, to be held by him as property of Jackson Barnett under and pursuant to the act of Congress relating thereto, the defendant The Equitable Trust Company of New York, shall be discharged from all duty, responsibility, accountability and liability under the agreement executed by the Baptist Home Mission Society to the Equitable Trust Company of New York and dated February 1, 1923, and with respect to the property received by it thereunder, the income and proceeds thereof.

199 3. This court hereby retains jurisdiction of this cause and of the property above described for the purpose of hereafter entertaining and deciding applications by counsel for the plaintiff and counsel for the defendants for allowances out of said property for their services and disbursements, which applications are hereby authorized to be made within twenty days after the expiration of three months after the entry of this decree if no appeal from this decree be taken within said three months or within twenty days after the return to this court of the mandate of the appellate court (or other order finally disposing of such appeal) if this decree be appealed from, or within such further time as this court hereafter by subsequent order herein may allow; and for the purpose of hearing and determining such application the present term of this court is hereby extended until such determination is made; and execution of the next preceding paragraph of this decree is hereby stayed and compliance therewith enjoyed until such applications are finally determined.

JNO. C. KNOX, *U. S. D. J.*

200 In United States District Court

[Title omitted.]

Order as to application for allowance

Mar. 7, 1928

On the annexed affidavit of Edward J. Patterson, verified the 7th day of March, 1928, and on the annexed consent of Charles H. Tuttle, United States attorney, solicitor for the United States of America, it is

Ordered that the applications of counsel for allowances for services and disbursements out of the property mentioned and described in the decree dated and entered herein the 21st day of Novem-
201 ber, 1927, may be made within twenty days after the entry of an order by the Circuit Court of Appeals for the Second Circuit upon a motion to be made in said court, returnable the 19th day of March, 1928, to dismiss the appeal to said court taken by the defendant The American Baptist Home Mission Society, and in any event said applications may be made on or before the 2d day of April, 1928; and this court hereby retains jurisdiction of this cause and of the property described in said decree for the purpose of entertaining and deciding applications, and for such purpose the term of this court at which said decree was rendered is hereby further extended until such determination is made; and execution of paragraph 2 of said decree is hereby stayed and compliance therewith enjoined until such applications are finally determined.

The extensions and stay hereby granted are in addition to and not in limitation of the provisions of paragraph 3 of said decree, all of which shall remain in full force and effect.

JNO. C. KNOX, *U. S. D. J.*

202 In United States District Court

[Title omitted.]

Order as to applications for allowances

Mar. 28, 1928

Upon the annexed affidavit of Carroll G. Walter, verified March 27, 1928, and the subjoined consent of Charles H. Tuttle, United States attorney, solicitor for the United States of America, it is

Ordered that applications for allowances pursuant to paragraph 3 of the decree of November 21, 1927, herein may be made
203 within twenty days after the entry of an order of the Circuit Court of Appeals for the Second Circuit upon the motion now set for hearing in said court on April 9, 1928, to dismiss the ap-

peal to said court taken by the defendant mission society or within twenty days after said appeal is otherwise dismissed or disposed of or remains inoperative or of no effect; and this court hereby retains jurisdiction of this cause and of the property described in said decree for the purpose of entertaining and deciding such applications, and for such purpose the term of this court at which said decree was rendered is hereby further extended until such determination is made; and execution of paragraph 2 of said decree is hereby stayed and compliance therewith enjoined until such applications are finally determined.

The extensions and stay hereby granted are in addition to and not in limitation of the provisions of paragraph 3 of said decree, all of which shall remain in full force and effect.

JNO. C. KNOX, *U. S. D. J.*

I hereby consent to the entry of the foregoing order.

CHARLES H. TUTTLE,
United States Attorney,
Solicitor for United States of America.

204 In United States District Court

[Title omitted.]

Order as to applications for allowances

May 25, 1928

Upon the annexed affidavit of Carroll G. Walter, verified May 24, 1928, and the subjoined consent of Charles H. Tuttle, United States attorney, solicitor for United States of America, it is

Ordered that applications for allowances pursuant to paragraph 3 of the decree of the November 21, 1927, herein may be made within twenty days after the expiration of the time limited by law
205 for the filing of a petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit dismissing the appeal of the defendant mission society from the said decree if no such petition be filed within the time limited therefor, or within twenty days after the denial of a petition for such a writ of certiorari if such petition be filed and denied, or within twenty days after the issuance of the mandate of the Supreme Court of the United States upon such writ of certiorari if a petition therefor be filed and granted, or within such further time as this court hereafter by subsequent order herein may allow; and this court hereby retains jurisdiction of this cause and of the property described in said decree for the purpose of entertaining and deciding such applications, and for such purpose the term of this court at which said decree was rendered is hereby further extended until such determination is made; and execution of paragraph 2 of said

decree is hereby stayed and compliance therewith enjoined until such applications are finally determined.

The extensions and stay hereby granted are in addition to and not in limitation of the provisions of paragraph 3 of said decree, all of which shall remain in full force and effect.

JNO. C. KNOX, *U. S. D. J.*

I hereby consent to the entry of the foregoing order.
May 24, 1928.

CHARLES H. TUTTLE,
United States Attorney,
Solicitor for United States of America.

206 In United States District Court

[Title omitted.]

Notice of motion for allowance to prochein ami

Please take notice that upon all the pleadings and proceedings heretofore had herein, including the affidavits submitted upon an application by counsel for the plaintiff made simultaneously herewith for an allowance to themselves for their services and disbursements, Elmer S. Bailey, the prochein ami herein, will move the court above named at a stated term thereof for the hearing of motions to be held at the Old Post Office Building, Borough of Manhattan, city, county, State, and Southern District of New York, on November 9, 1928, at 10.30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an allowance to himself for his services as prochein ami herein.

Dated November 7, 1928.

ELMER S. BAILEY,
Prochein Ami.

207 To CHARLES H. TUTTLE, Esq.,
United States Attorney,
Solicitor for United States of America.

Due and timely service of the foregoing notice of motion is hereby admitted.

CHARLES H. TUTTLE,
United States Attorney,
Solicitor for United States of America, Intervenor.

208 In United States District Court

[Title omitted.]

Notice of motion for allowance to plaintiff's counsel

Please take notice that upon the annexed affidavit of Carroll G. Walter, verified October 31, 1928, and the annexed affidavits of Ray-

burn L. Foster and Almond D. Cochran, verified August 24, 1927, and upon all the pleadings and proceedings heretofore had herein, and pursuant to paragraph 3 of the decree of this court herein dated November 21, 1927, and the subsequent orders extending the time therefor, the undersigned Edward J. Patterson, J. Frederick Eagle, William Greenough, Sherman Day, Carroll G. Walter, and Dodge L. Marks, composing the firm of Patterson, Eagle, Greenough & Day; Rayburn L. Foster and R. B. F. Hummer, composing the firm of Hummer & Foster; Almond D. Cochran, surviving partner of the firm of Cochran & Ellison; C. B. McCrory and Dudley
209 C. Monk, co-partners composing the firm of McCrory & Monk, who collectively compose the solicitors and counsel for the plaintiff herein, will move the court above named at a stated term thereof for the hearing of motions, to be held at the Old Post Office Building, Borough of Manhattan, city, county, State, and Southern District of New York, on November 9, 1928, at 10.30 a. m., or as soon thereafter as counsel can be heard, for an allowance to them out of the property described in said decree for their services and disbursements herein.

Dated November 7, 1928.

PATTERSON, EAGLE, GREENOUGH & DAY.
HUMMER & FOSTER.
COCHRAN & ELLISON.
MCCRORY & MONK.

To CHARLES H. TUTTLE, Esq.,
United States Attorney,
Solicitor for United States of America.

Due and timely service of the foregoing notice of motion and annexed affidavits is hereby admitted.

CHARLES H. TUTTLE,
United States Attorney,
Solicitor for United States of America, Intervenor.

210 In United States District Court

[Title omitted.]

Affidavit of Carroll G. Walter in support of application for allowances

STATE OF NEW YORK,
County of New York, ss:

Carroll G. Walter, being duly sworn, deposes and says:

I am a member of the firm of Patterson, Eable, Greenough & Day, solicitors for the plaintiff herein.

I was admitted to the bar of the State of New York in 1908, and have been engaged in active practice since that time. In addition to general practice in the State courts and in this court I have conducted

cases in the Supreme Courts of Virginia and Pennsylvania, United States District Courts for the Eastern and Northern Districts of New York and the Northern and Southern Districts of Ohio, the Circuit Courts of Appeals for the First, Second, and Sixth Circuits, and the Supreme Court of the United States.

211 My firm was retained on behalf of the plaintiff in this case in January, 1925, the retainer being by Elmer S. Bailey, the then acting guardian of Jackson Barnett, acting through the law firms of Hummer & Foster, of Henryetta, Oklahoma, and Cochran & Ellison, of Okmulgee, Oklahoma.

During the two years succeeding the retainer approximately one-third of my working time was devoted to this case. In addition to my personal work some services have been performed by other members of my firm and considerable service has been performed by lawyers employed by the firm, and there has also been a vast amount of stenographic service.

The case was taken by my firm entirely upon a contingent basis, and that necessarily had to be the basis because said guardian had no funds with which to pay for services and the Government officials having the custody and control of the restricted funds of Jackson Barnett refused to permit any of such funds to be used for the purpose of prosecuting this case, as is more fully shown in the other affidavits hereto annexed and in the testimony constituting part of the record herein.

The case was novel both upon the law and the facts, and by reason thereof required an extraordinary amount of original research.

Upon its facts the case was so strange and amazing as to tax credulity, despite the implicit confidence I had in the counsel who first laid the strange tale before me, and by reason thereof I felt it my duty to, and I actually did, scrutinize with the greatest care every bit of evidence and every propositon of law.

212 My services began with conferences with Mr. Foster and Mr. Cochran as to the proper form of action, the proper forum, and the name in which the suit should be instituted, and investigations of numerous questions of law upon those subjects, including the right of an Indian to sue, the right of a guardian to sue, and the theory and function of a prochein ami.

There then followed the preparation of the bill, which it was first thought could be based upon the simple proposition that a mental incompetent had made a gift which was void because of his mental incapacity.

In due course the defendants filed answers in which they set up as a defense that the plaintiff was and is a so-called "restricted Indian" and as such was subject to the jurisdiction of the Secretary of the Interior, who had approved the gift, and that in view of such approval no person had any right to attack the validity thereof.

In view of such answers it was concluded by my associates and myself that there should be filed an amended bill setting out in detail the facts as to how the gifts and the Secretary's approval thereof had been obtained. A rather lengthy amended bill was then prepared and filed on May 7, 1925.

Elaborate answers thereto were filed by the defendants in June, 1925. In those answers the defendants put in issue substantially all the material averments of the bill, including the fact of Barnett's alleged mental incompetency, and again set up the same defense that the Secretary's act in approving the gift was not subject to attack.

213 Those answers thus made necessary the taking of extensive depositions upon several very broad issues including (a) the mental competency of Barnett, (b) the conspiracy by which the gifts were alleged to have been obtained. They necessitated also an extensive investigation into a subject of law practically unknown in this jurisdiction, viz, the laws relating to the allotment of lands of Indians of the Five Civilized Tribes and the leasing of such lands, particularly leases for oil and gas, and the jurisdiction and authority of the Secretary of the Interior over such allotted lands and their proceeds and the royalties of such leases.

The taking of the depositions necessarily would involve considerable cash outlay and the problem was presented as to how the necessary funds for that purpose could be obtained. Thereupon, in October, 1925, a motion was made for an allowance of $3,000 out of the income in the hands of the defendant Trust Company for the purpose of defraying the expenses of the prosecution of the suit. A somewhat similar motion previously had been made in the Supreme Court of the District of Columbia in a similar suit there pending relating to that part of the $1,100,000 which had been given to Mrs. Barnett and placed by her in trust with the Riggs National Bank; and such motion had been denied by that court because the justice there presiding "doubted" his authority to grant it. In view of that expression of doubt an extensive investigation of the law as to the authority of the court in such matters was necessary and was made.

The affidavits upon the motion for allowance for expenses exceed 20 pages in length and the brief and reply brief submitted
214 thereon exceed 60 pages and cite many authorities respecting the authority of courts of equity over incompetents. The motion was vigorously opposed by the defendants. Their answering affidavits consisted of 11 pages; their brief in opposition consisted of 7 pages, and one of their counsel came to New York from Oklahoma for the purpose of arguing in opposition to it. The motion was twice argued before Judge Thacher and finally was granted by an order dated March 2nd, 1926. That motion was solely for expenses, no counsel fees being then either asked or granted. The order directed the defendant Trust Company to pay out of the income from the $550,000 of bonds in its possession the sum of $3,000, of which $1,000

was to be paid to my firm and $2,000 to the firm of Hummer & Foster. The order further provided as follows:

"Ordered, that said $3,000 shall be applicable only to such expenses of this suit as shall hereafter be allowed and approved by this court. Expenses incurred for the benefit of all suits heretofore brought by said Bailey for the recovery of any part of the $1,100,000 mentioned in the amended bill herein shall be deemed expenses of this suit to the extent of such proportion of the total thereof as the amount claimed in this suit bears to the amount claimed in all such suits, which proportion the parties agree is 550/915."

While the motion for an allowance for expenses was pending before Judge Thacher, the United States of America, through the
215 Department of Justice and the United States attorney for the Southern District of New York, moved for leave to intervene in this case and to file a petition of intervention wherein it prayed that the defendants be decreed to have received $550,000 of Liberty bonds as the property of Jackson Barnett, that they be required to account for such bonds and the proceeds and all interest and profits therefrom, and that "after deducting the reasonable expenses incident to this litigation said bonds and the proceeds thereof and the interest and profits thereon be delivered and paid over to the Secretary of the Interior of the United States."

That intervention was consented to by my firm on behalf of the plaintiff, and indeed it fairly may be said that the intervention was brought about through the efforts of the plaintiff, as is more fully set forth in the annexed affidavit of Mr. Cochran. The defendant Mission Society opposed the intervention and one of its counsel again came from Oklahoma to New York for the purpose of arguing in opposition thereto. I personally participated in the matter to the extent of conferring with Assistant United States Attorney Crawford and furnishing him with some authorities supporting the right of the United States to intervene. The motion to intervene was granted by an order dated January 29, 1926.

Answers to the intervening petition was filed by the defendants and served upon my firm and it became necessary to study those answers. Subsequently the United States filed an elaborate amended petition of intervention in April, 1926. That amended peti-
216 tion required additional study and in addition a number of conferences were had with the solicitors for the defendants and with Assistant United States Attorney Crawford with respect to the filing thereof.

On April 30, 1925, I made a trip to Washington, D. C., for the double purpose (a) of conferring with Mr. Foster with reference to the prosecution of this suit, and (b) of listening to the argument of a series of motions in the case in the Supreme Court of the District of Columbia involving a part of the $550,000 of bonds which had been given to Mrs. Barnett. Those arguments lasted substantially an entire day and covered a great part of the law and facts involved

in this case. Some of the arguments were made by Mr. Rogers and Mr. Lyttle, who there appeared for Mrs. Barnett and who subsequently appeared in this case for the defendant Mission Society.

In November, 1925, I made another trip to Washington, D. C., for the purpose of conferring with Mr. Foster and Mr. Cochran, who were then in Washington having conferences with the Department of Justice with reference to its intervention in this case.

In March, 1926, I made a third trip to Washington, D. C., for the double purpose (a) of conferring with the Department of Justice with reference to the prosecution of this case, and (b) of obtaining and studying the minutes of the hearings before the sub-committee of the Committee on Indian Affairs of the House of Representatives, which in January, 1925, had investigated certain charges against Commissioner Burke with reference, among other things, to
217 the action taken by him in connection with the transfer of the $1,100,000 of bonds here in controversy. Those minutes were exceedingly voluminous, consisting of approximately 2,000 pages, and I felt it my duty to, and I did, examine the same with great care. Among the witnesses who testified before that congressional committee were A. J. Ward and Harold McGugin and Assistant Commissioner Merritt, and their testimony was of the greatest importance and required a great amount of time in its examination and study.

From that time, i. e., the end of March, 1926, until the end of January, 1927, I was engaged upon this case almost continually, and devoted many evenings and Sundays to work upon it.

The months of April and May, 1926, were devoted to the study of documents and voluminous correspondence with Mr. Foster with respect thereto and with respect to the obtaining of necessary copies and the locating of witnesses and to arranging for the taking of their depositions.

About May 18, 1926, I gave notice of the taking of the depositions of various witnesses on behalf of the plaintiff at Henryetta, Oklahoma, on June 1; at Tulsa, Oklahoma, on June 8; at Coffeyville, Kansas, on June 10; and at Washington, D. C., on June 15, 1926. Similar notices were then given on behalf of the United States. A stipulation was then negotiated and entered into between the parties, by which it was provided that the plaintiff and the United States should be at liberty to take under said notices the testimony of additional witnesses not named in the notices and that the defendants should be at liberty to take the testimony of witnesses on their
218 own behalf at any or all the places specified in said notices and before the officers therein named without the giving of any notice except notice to the counsel then attending at said places respectively. Shortly thereafter the defendant Mission Society gave notice that it would take the depositions of various witnesses at Washington, D. C., on June 15th, and at Los Angeles, California, on June 28, 1926.

I left New York for Oklahoma on May 27, 1926, and was continuously absent from New York until June 19, 1926. During that

interim my entire time was devoted to work upon this case, including evenings and Sundays, and during practically the whole of that time Mr. Foster was engaged with me. By that time we had obtained copies of several hundred letters and documents on file in the office of the Secretary of the Interior, making up about 1,000 pages of typewritten matter, every word of which I read and digested for the purpose of determining its bearing upon this case.

May 29, 30, and 31, 1926, were devoted to conferences with Mr. Foster and with various witnesses to be examined in Henryetta. June 1, 2, 3, 4, and 5 were devoted to the taking of the depositions of upwards of 20 witnesses on behalf of the plaintiff and 8 witnesses on behalf of the defendants. Some of the examination was conducted by Mr. Foster and some by myself. We both endeavored to be always present, but in order to save time and expedite the matter and maintain the schedule laid out for the taking of the depositions in other places we sometimes had to resort to the device of his interviewing one witness while I examined another and then of my interviewing still another witness while he examined the one whom he had interviewed.

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The evenings of those days were devoted partly to the interviewing of other witnesses to be examined at Henryetta and partly to preparation for the examination of Mr. Mott and other witnesses at Tulsa, the examination of Mr. McGugin at Coffeyville, and the examination of Mr. Burke at Washington. The days and evenings of June 6 and 7 were spent in the same way. Preparation for the examination of Mr. McGugin necessitated the preparation of a petition and order for a subpoena duces tecum requiring McGugin to produce certain documents which had to be enumerated in advance, and the obtaining of such order from Judge Pollock at Kansas City. Preparation for the examination of Mr. Burke necessitated preparation of a list of upwards of 100 documents which he was requested to produce from the files of his office. It was necessary also to obtain certified copies of numerous documents from the County Court of Okmulgee County and from the office of the Superintendent of the Five Civilized Tribes at Muskogee.

June 8 and 9, 1926, were devoted to the taking of the depositions at Tulsa. The evenings of those days were devoted to conference with Mr. Foster and Mr. Cochran and with Mr. Shelby, special assistant to the Attorney General.

June 10, 1926, was devoted to the taking of the deposition of Mr. McGugin at Coffeyville.

With two exceptions all the days devoted to the taking of depositions were full days running from 9 or 9.30 o'clock in the morning to 5.30 or 6 o'clock in the evening, and the taking of the deposition of Mr. McGugin lasted until after 7.

220

On June 11, 1926, I returned from Coffeyville to Henryetta, made further preparations for the Washington depositions

and then left for Washington with Mr. Foster on the afternoon of June 12th. Our preparations continued on the train on June 13th.

June 14 was devoted to conferences with Assistant Attorney General Parmenter, Special Assistant Selby, and with other lawyers of the Department of Justice.

June 15, 16, 17, and 18 were devoted to the taking of the depositions of Mr. Burke and of the other witnesses in Washington. These also were full days with the exception of the 18th; and as usual the evenings were devoted to further preparation.

Upon my return to New York I endeavored to arrange to have the case set for trial during that month, but was unsuccessful.

Shortly after that I began preparation of the brief and worked on it from time to time during the summer.

On August 25, 1926, the defendant mission society served notice that it would take the depositions of various witnesses at Los Angeles on September 20; and on September 1 it served notice that it would take the depositions of various witnesses at Henryetta on September 9, and the depositions of various witnesses at Tulsa on September 13. I thereupon made a motion to vacate and set aside those notices on the ground that the time for the taking of depositions had expired and that the taking of further depositions at Henryetta and Tulsa by the defendant was not in accord with the stipulation above men-
221 tioned. The preparation of the affidavits for and the argument of that motion occupied a number of days, there being at least three appearances before Judge Thacher with respect thereto. By an order dated September 16, 1926, this motion to vacate was denied upon condition that the defendant mission society pay to the solicitors of record for the plaintiff $4,500 on account of counsel fees and $750 for expenses for attending upon the taking of the depositions, but if the mission society failed to make the payments, the motion to vacate was granted. The mission society elected not to make the payments, and those depositions were not taken.

In October, 1926, the defendant mission society asked leave to file an amended answer to the amended petition of intervention of the United States, and after several conferences with respect thereto a consent order permitting the filing of such amended answer was entered.

Later in October, 1926, I learned that Jackson Barnett was in Oklahoma in the custody of a United States marshal, having been brought there, as I was informed, for the purpose of appearing before the Federal grand jury in some investigation. I then had some conferences with representatives of the Department of Justice with reference to the possibility of having Barnett brought to New York for the trial of this case, and I collaborated with Assistant United States Attorney Crawford in obtaining from this court a writ of habeas corpus ad testificandum directing the United States marshal to produce Jackson Barnett before this court on October 15, 1926,

which was the date when it was expected that the case would be tried.

222 Barnett was brought to New York by the marshal in obedience to that writ, and on October 12, 1926, I had an interview with him in the presence of Assistant United States Attorney Crawford at the office of the United States attorney.

During October, 1926, much time was consumed in answering the calendar and in endeavoring to have the trial fixed for a day certain. At one time when it appeared that the case would be reached for trial Mr. Foster came on from Oklahoma for the purpose of attending, but then returned when the case was adjourned.

Meanwhile I was continuing to work upon the brief and Mr. Foster's presence here was utilized as an opportunity for further conference with reference to the same.

On October 27, 1926, I went to Washington in company with Mr. Foster and Special Assistant Selby, for the purpose of discussing with Attorney General Sargent some of the questions of law involved in this case, and at that conference Solicitor General Mitchell also was present.

On October 28 and 29, 1926, I attended upon the taking of depositions of four witnesses on behalf of the defendants at the office of Mr. Fettretch in New York, and also cross-examined those witnesses. The taking of those depositions consumed the whole of both days. Those witnesses had been brought on to New York for the purpose of testifying upon the trial, and in order to relieve the defendants from the necessity of holding them over until the adjourned date or having them return to New York, I consented that their depositions might be then taken out of court.

223 The trial of the case started on November 16th, and was continued on the 17th, 18th, 19th, 22nd, 23rd, and 24th.

Mr. Foster was present with me throughout the trial and also remained for several days thereafter, working with me day and night and Sunday in preparation for the next day's hearing or upon the brief. During that time Mr. Cochran was in Washington and on two occasions he came over to New York on Sunday and spent the day working with Mr. Foster and me on the brief.

The brief for the plaintiff was finally completed on December 16, 1926. On that day Mr. Fettretch requested an extension of time, and after appearing before Judge Knox the time for exchanging briefs was extended to December 31st, and the time for reply briefs was fixed at January 10, 1927, which subsequently was extended to January 15th.

I received the mission society's brief on December 31, 1926, and then prepared plaintiff's reply brief, which was completed and submitted on January 15, 1927.

On January 17, 1927, I was served with a notice of motion by the defendant mission society for an order requiring Bailey to give security for costs. I examined the law with reference to requiring

a prochein ami to give security for costs, and prepared a brief and made an oral argument in opposition to the motion, and the motion was denied.

At about the same time I prepared papers for and served notice of a motion for a further allowance of $2,000 for expenses. When the motion came on for hearing Judge Thacher suggested that
224 as counsel already had laid out of the money and the case had been tried (and the allowance thus was not necessary to enable the suit to be prosecuted) he thought the application might well wait until a decision was announced so that it could be taken up along with any other application for allowance which might then be made. With his permission I thereupon withdrew that motion.

On August 9, 1927, this court handed down its opinion, holding the gift invalid (21 Fed. 2d, 325–332). The court had thus had the case under advisement a little over seven months.

Shortly after the decision was announced Mr. Foster and Mr. Cochran came to New York for a conference with respect to the proposed accounting and the form of the decree and other questions. While in New York on that trip they prepared, in conjunction with myself their affidavits, which are hereto annexed and herewith submitted in support of this application for allowance.

At my suggestion the Equitable Trust Company submitted its account without having the cause referred to a master for the purpose of taking and stating the account. Upon checking over the account which it submitted I found that it had paid itself certain commissions. I felt that it was not entitled to such commissions and so advised its counsel, and by agreement between such counsel and myself the question was submitted to Judge Knox. In that connection I prepared and submitted a memorandum of law nine pages in length and citing twelve authorities. Judge Knox ruled that the trust company was not entitled to commissions, and the trust company thereupon submitted a new account, which did not in-
225 clude any charge for commissions. That account was then accepted and a final decree was entered on November 21, 1927, directing the trust company to deliver to the Secretary of the Interior of the United States, to be held by him as property of Jackson Barnett under and pursuant to the acts of Congress relating thereto, the following-described property, which appeared from said account to be in his possession, to wit:

$155,000.00 par value United States of America 4th Liberty loan 4¼s, due October 15, 1938.
100,000.00 par value United States of America 1st Liberty loan 3½s, due June 15, 1947.
80,000.00 par value United States of America 2nd Liberty loan converted 4¼s (exchanged for 2nd, 4s originally received).
216,000.00 par value United States Government 4s, due December 15, 1954.
108,000.00 par value United States of America Treasury notes 4½s, due December 15, 1927.
777.27 in cash.

650,777.27

The decree contained a further provision, however, for retaining jurisdiction of the cause and of the property above described for the purpose of thereafter entertaining and deciding applications by counsel for allowances out of said property for their services and disbursements.

226 In February, 1928, the defendant mission society appealed, or at least attempted to appeal, from said decree of November 21, 1927. It served and filed a notice of appeal, assignment of errors, and a bond, and obtained a citation. A motion was then made on behalf of the plaintiff to dismiss said appeal upon the ground that the defendant trust company was a necessary party appellant and had not joined in such appeal.

The work in connection with the preparation of said motion to dismiss was performed by my partner, Mr. Patterson, in conjunction with Mr. Foster, who came to New York for the purpose. The motion papers embraced approximately 150 pages.

After the notice of motion to dismiss the appeal was served, the mission society served notice of a motion in the district court for an order severing the case of the mission society from that of the trust company nunc pro tunc as of a date prior to the expiration of three months from the date of the entry of the decree. The law with respect to such motion was examined and a brief in opposition thereto was prepared. After that work was done the mission society voluntarily withdrew the motion before the same came on for hearing. It then served notice of a motion in the Circuit Court of Appeals for an order granting leave to the trust company to join in and become a party appellant to the appeal and to amend the notice of appeal theretofore served by the mission society by adding the trust company thereto as an additional appellant.

The plaintiff's motion to dismiss the mission society's appeal and the mission society's motion for leave to join the trust com-
227 pany as an additional appellant, were argued orally before the Circuit Court of Appeals on April 9, 1928. I also prepared and submitted upon those motions a printed brief of 30 pages citing upwards of 40 authorities.

On May 7, 1928, the Circuit Court of Appeals denied the motion to amend and granted the motion to dismiss. It delivered an elaborate opinion by Judge Swan, which is reported in 26 Fed. (2d), 350–354.

Within the three months allowed by law the mission society filed a petition to the Supreme Court of the United States for a writ of certiorari, with a brief in support of such petition. In that petition the mission society asked for a review, not only of the decision of the Circuit Court of Appeals but also of the decision of this court. That petition and brief, with appendices, consisted of 33 printed pages. In opposition thereto I prepared, in conjunction with Mr. Foster and Mr. Cochran, a brief of 24 printed pages citing 50 authorities. I also conferred and collaborated with the Department of Justice in the preparation of a separate brief submitted by the

United States in opposition to the mission society's petition for a writ of certiorari.

The petition for certiorari was submitted to the Supreme Court of the United States on October 1, 1928, and was denied by it on October 22, 1928.

The case has thus finally terminated with complete success for the plaintiff after a strenuously contested litigation which lasted nearly four years.

By orders of this court the time for making applications for allowances pursuant to paragraph 3 of this court's decree of
228 November 21, 1927, has been extended to twenty days after the denial of such petition for a writ of certiorari.

The pleadings in this case cover 163 pages. The plaintiff's depositions at Henryetta cover 560 pages. Those at Tulsa cover 195 pages and 15 pages of exhibits. Those at Coffeyville cover 188 pages of testimony and 35 pages of exhibits. Those at Washington cover 399 pages of testimony and 425 pages of exhibits offered by the plaintiff and 318 pages of exhibits offered by the defendants upon the taking of those depositions. The depositions taken by the defendants at Henryetta cover 330 pages, and those taken by the defendants at New York cover 180 pages. The minutes of the trial cover 783 pages. A number of additional exhibits of great volume were also offered upon the trial. The total number of exhibits offered by the plaintiff was 191. The record thus embraces more than 3,500 pages. The brief for the plaintiff in this court covers 446 printed pages, and the reply brief covers 27 printed pages.

In connection with the prosecution of the case I have written 200 letters and 70 telegrams, and have received and read 230 letters and 50 telegrams. Many of the letters were of great length and contained extended discussions of questions of law, questions of testimony, and questions of policy.

In the prosecution of this suit the following expenses have been necessarily incurred and actually paid by my firm:

Deposit for clerk's fees in District Court	$15.00
Marshal's fees	4.48
Copy of opinion of Judge Thacher	1.80
229 Traveling expenses, including 4 trips to Washington to examine documents and confer with Department of Justice, and trip to Henryetta and Tulsa, Oklahoma, Coffeyville, Kansas, and Washington, D. C., for the purpose of taking depositions	553.99
Telegrams and telephones	132.36
Certified copies of documents, photostats, special paper for exhibits, and testimony	62.45
Bar Association room charges	11.30
Expressage	4.87
Notary fees and carfares	2.60
Dinners and overtime	49.75
Minutes of trial, and copy of defendants' New York depositions	738.75
Printing Brief for plaintiff	973.74
Printing reply brief and addenda thereto	63.45
Copy of opinion of Judge Knox	10.00
Printing of said opinion	30.00

Outside stenographic services in preparing papers for motion in Circuit Court of Appeals to dismiss appeal	$77.02
Clerk's fees on motion in Circuit Court of Appeals	8.60
Printing brief for Circuit Court of Appeals	42.70
Copy of opinions Circuit Court of Appeals and Judge Knox's second opinion	5.30
Printing brief for Supreme Court in opposition to petition for writ of certiorari	61.80
Total	2,849.40

230 All said expenses were actually necessary and are reasonable in amount; and no part thereof has been paid except the $1,000 paid by the Equitable Trust Company pursuant to the order herein on March 2, 1926.

In addition to the services in this case I have rendered some assistance to Mr. Foster and Mr. Cochran in the "prohibition case" and in the proceedings to vacate the guardianship in Oklahoma, which are referred to in greater detail in the affidavits of Mr. Foster and Mr. Cochran hereto annexed.

The prosecution of this case has been opposed, not only by the defendants therein but also by Mrs. Barnett and the Department of the Interior. From the time the gifts were made down to and including the trial the attitude of the Department of the Interior was thoroughly hostile to the suit, and it not only persistently refused aid in the recovery of the money but it also refused to permit the use of any of Barnett's money in the prosecution of the suit and it actively aided the defendants in opposing it. (See pp. 209–215, 221–230, 247–265 of brief for plaintiffs in this court, and testimony and exhibits there referred to.) Commissioner Burke's presence in court throughout the trial in company with the defendant's counsel, and his active assistance to the defendants both personally and through his assistant, Mr. Dawson, will be well remembered by the court. Furthermore, Secretary Work himself, although not the Secretary who approved the gifts, went so far as to request the Attorney General to decline to assist in the prosecution of the suit.

231 Thus, in a letter from him to the Attorney General, dated February 7, 1925, he said (Pltff.'s Wash. dep., Vol. V, pp. 867–868):

"The matter has been fully considered in this department, and I see no reason why your department should assist the above named Elmer S. Bailey or his attorney in litigation to invalidate the action taken by this department in relation to the above mentioned distribution of Liberty loan bonds out of the Jackson Barnett estate. It is therefore requested that you decline the above mentioned request of Messrs. Hummer & Foster, attorneys for Elmer E. Bailey, to assist them in the litigation which they have instituted in the Jackson Barnett matter. A copy of my letter of January 27, 1925, to Messrs. Hummer & Foster, declining to authorize the use of the funds of Jackson Barnett to finance the litigation is enclosed for your information."

The suit thus has been successfully prosecuted over the protest and in the face of the steadfast opposition of the department of the Government to which the court finds the money should be returned.

That the Department of Justice finally intervened in the case on the side of the plaintiff and assisted in its prosecution is due entirely to the strenuous efforts of counsel for the plaintiff, Mr. Cochran and Mr. Foster, as is more fully set forth in their affidavits, to which reference is hereby made.

Moreover, the successful prosecution of the suit necessitated going into the enemy's camp and extracting the facts from the
232 mouths of hostile and adverse witnesses, (McGugin, Mott, Ward, and Burke), and from documents in their possession.

No compensation for any services rendered by counsel for the plaintiff has been paid.

CARROLL G. WALTER.

Sworn to before me this 31st day of October, 1928.

LILLIAN M. JACOB,
[SEAL] *Notary Public, Kings County.*

Kings Co. clerk's No. 81; registers' No. 196.
New York Co. clk's No. 242; reg.'s No. 0-164.
Commission expires March 30, 1930.

233 In United States District Court

[Title omitted.]

Affidavit of Rayburn L. Foster in support of application for allowances

STATE OF NEW YORK,
County of New York, ss:

Rayburn L. Foster, being duly sworn, deposes and says:

I reside in Henryetta, Oklahoma. I was admitted to the bar of that State in 1916, and have been engaged in the practice of law there since that date. I am also a member of the bar of the Supreme Court of the United States. At all times hereinafter mentioned I was a member of the firm of Hummer & Foster.

In June, 1924, the County Court of Okmulgee County, Oklahoma, accepted the resignation of Carl J. O'Hornett as guardian of the person and estate of Jackson Barnett, an incompetent, and appointed Elmer S. Bailey as such guardian in his place and stead.
234 Bailey retained my firm as his counsel immediately after his appointment, and from that time until February, 1927, I was engaged in investigating the transaction out of which this suit arose and in conducting this suit and other litigation connected therewith. As a conservative estimate I would say that three-fourths of my working time during that period has been spent upon those matters, and for none of those services have I received any compensation whatsoever.

I studied the legal questions presented by a gift by an incompetent Indian of his restricted funds approved by the Secretary of the Interior, and endeavored to learn the detailed facts as to how this gift had been obtained. I conferred with Carl J. O'Hornett, the former guardian, and with Ex-Judge McCrory, of the firm of McCrory & Monk, who had been counsel for O'Hornett during the time he had acted as guardian, and examined some of the records of the County Court and ascertained: (a) that the County Court had found that the gifts were of such doubtful validity as to require suits for the recovery thereof and that the guardian was without available funds for that purpose, and had directed the guardian to apply to the Secretary of the Interior and to the Superintendent of the Five Civilized Tribes for funds and cooperation in the bringing of such suits; (b) that despite such orders no funds for that purpose had been supplied; and (c) that O'Hornett, through McCrory & Monk, as his attorneys, had petitioned Secretary Work to vacate the order approving the distribution and solicited his cooperation and support in recovering the money, and that such petition had been denied, or at least ignored.

235 In fact, I was informed that one of the things which had led O'Hornett to resign was the fact that he could obtain no help, either financial or otherwise, in taking up the heavy burden of instituting and prosecuting suits for the purpose of setting aside the gifts.

Exclusive of the $1,100,000 which had been so transferred, and the income and proceeds thereof, the only property owned by Barnett was (a) a small amount of real estate located near Henryetta which was of nominal value only and produced practically no income, and (b) his allotment of 160 acres in Creek County, which was restricted from sale and produced no income other than the royalties under the lease mentioned in the bill herein, which royalties, under the terms of said lease, were payable and were being paid to the Superintendent of the Five Civilized Tribes at Muskogee. Practically no funds came into Bailey's hands either at the time of his appointment or subsequently, and the superintendent refused and the Secretary refused to pay said royalties or any other of Barnett's funds to Bailey. In fact, they would not even pay to Bailey any funds for Barnett's support, and, on the contrary in a very short time began paying Barnett's funds to a guardian appointed in California.

The task of recovering the $1,100,000 thus looked almost hopeless. On , 1924, I entered into a contingent fee contract with Bailey as guardian, which contract was approved by the County Court of Okmulgee County. A copy of said contract is hereto annexed and is hereby asked to be read in connection with and as a part of this affidavit.

236 I retained the firms of Cochran & Ellison and McCrory & Monk, of Okmulgee, Oklahoma, to co-operate with my firm in attempting to recover the $1,100,000 upon an agreement that they

would share with my firm in the fees which would be realized in the event of success.

It was always understood and agreed between Cochran & Ellison and McCrory & Monk and Bailey and my firm that compensation for our services was to be contingent upon success, and that necessarily had to be the agreement because of Barnett's incompetency to make any contract and the absence of any fund out of which fees could be paid except in the event of success.

In January, 1925, I went to Washington, D. C., and attended a number of hearings before the subcommittee of the Committee on Indian Affairs of the House of Representatives, which was then investigating this gift of the $1,100,000 of Barnett's funds. I attended for the purpose of learning the facts as to how the gifts in question had been made. Mr. Cochran and Judge McCrory were with me. Bailey and O'Hornett were also present. I was away from my office on that occasion for about three weeks.

While in Washington on that occasion I went to New York and consulted with the firm of Patterson, Eagle, Greenough & Day, and retained that firm to bring this suit.

The services rendered in this suit are set forth in the annexed affidavit of Mr. Walter and I will not repeat them.

I was in constant communication with Mr. Walter by mail
287 and telegraph throughout the entire period of the prosecution of this suit, participated in the preparation of bill and amended bill and of the affidavits upon the motion for an allowance for expenses, located and arranged for subpoenaing the various witnesses who were examined at Henryetta, Tulsa, and Coffeyville, interviewed a large number of those witnesses, attended at the taking of all of the depositions at Henryetta, Tulsa, Coffeyville, and Washington, was present in New York throughout the trial, also made several other visits to New York in connection with the case (making, in all, five trips to New York and two to Washington, when I did not come to New York), and collaborated with Mr. Walter in the preparation of the brief for the plaintiff.

In addition thereto I rendered other separate services which were necessary for the proper prosecution of this suit and which I will now narrate.

In September, 1924, I wrote the Secretary of the Interior protesting against recognition by him of the guardian which had been appointed for Barnett in California. The Secretary replied that the matter was being given consideration and that I would be advised of any action taken by his department. Despite that promise, the Secretary paid large sums to the California guardian without advising Bailey or me, and we learned the facts only through the congressional investigation in January, 1925.

In January, 1925, Mr. Cochran and I had a number of personal interviews with various officials of the Department of the Interior and of the Department of Justice, including Secretary Work, Com-

sioner Burke, and Assistant Attorney General Wells. At
238 these interviews we persistently urged that the gifts in question were invalid, that it was the duty of Bailey to have them set aside, and that it was the duty of both the Department of the Interior and the Department of Justice to aid and assist in so doing. To substantiate our contentions we submitted authorities and other data. That is especially true with respect to Assistant Atttorney General Wells.

On January 21, 1925, while in Washington, I supplemented the oral interviews with formal letters to Commissioner Burke and Secretary Work requesting sufficient funds out of the estate of Jackson Barnett to finance the litigation necessary to try out the questions as to the validity of the distribution. Secretary Work replied by letter dated January 27, 1925, as follows (pltff.'s Ex. 121, pltff.'s Wash. dept., p. 682):

"Reference is made to your request of January 21, 1925, for sufficient funds out of the estate of Jackson Barnett, Creek Indian, to finance litigation as to the validity of a certain distribution made of United States Liberty loan bonds of the par value of $1,100,000 out of the said estate.

"The matter has been fully considered and I see no reason for permitting the funds of Jackson Barnett to be used for expenses in litigation referred to in your letter. I must therefore decline to authorize the use of his funds for such purpose."

On February 14, 1925, I again presented the mattery to the Secretary of the Interior in a letter of over four closely typewritten
239 pages, in which I called his attention to several suits which had been brought respecting the distribution and cited some authorities. Among other things I said:

"To properly urge the invalidity of this disbursement, it will be necessary to take a large number of depositions at considerable expense, and we do not believe you will be justified in withholding the funds of Jackson Barnett and preventing his making a bona fide defense to this action and in seeking to recover the funds so disbursed. No just criticism could be offered at your permitting a reasonable amount of his funds to be used to test the validity of the disbursement of the estate, when the validity of such transaction is conceded by all to be of grave doubt. Because you may not believe these funds should be recovered for his estate does not justify you, in our opinion, in withholding funds to have the question determined by the courts, even though you may have the power to do so. By so doing you prevent a fair presentation of the facts to the court, which is the proper tribunal to determine the validity of the transaction.

"We are of the opinion that just criticism may be levelled at you should you persist in aiding and abetting Mrs. Barnett in this action by refusing to permit the use of the funds of Jackson Barnett in his defense. The policy of your department since 1922, the time when this distribution of Jackson Barnett's funds was made, has been to

aid and assist Mrs. Barnett in her desire to acquire control
240 of his estate and to prevent the recovery of the same from her.

We insist that this policy is wrong and now that the interests of Mrs. Barnett and those of Jackson Barnett are adverse, not only in fact but in the courts, you can no longer afford to maintain this policy.

* * * * * * *

"In fairness to yourself and in fairness to the interests of Jackson Barnett, we suggest that the very least thing you can do is to submit these questions to the Attorney-General of the United States for an unbiased opinion, and we respectfully request that you do so."

Very shortly after that letter was written the congressional committee above mentioned submitted its report and in that report it said:

"There are now pending three suits in the Federal courts—one against the superintendent and disbursing officer of the office of the Five Civilized Tribes at Muskogee, one against the Riggs National Bank, of Washington, D. C., and one against the Equitable Trust Co., of New York, which suits, if prosecuted to a final determination, will settle definitely the question of whether or not the distribution of $1,100,000 of the estate of Jackson Barnett as made is legal.

"It would be futile for your committee to express an opinion as to whether the various officials of the Interior Department who approved of the division of funds of Jackson Barnett acted within the law. That is a question which can be determined solely by the courts.

241 "Your committee is of the opinion, however, that this is a question of such fundamental importance that it should be determined by the courts as soon as possible. We therefore are of the opinion that the Secretary of the Interior would be justified in expending a reasonable sum out of the funds of Jackson Barnett in securing an early determination by the Supreme Court of the United States of the issues which have been raised."

Despite that recommendation, Secretary Work wrote me under date of March 12, 1925—which was nearly one month after that report had been submitted—as follows (Pltff.'s Ex. 122, pltff.'s Wash. dep., p. 683):

"I have given full and careful consideration to your communication with reference to the funds of Jackson Barnett. Every legal question connected with this matter will be settled in the litigation now pending in the courts. I do not feel, under the circumstances, that I would be justified in using the funds of Jackson Barnett in the way suggested in your letter."

The litigation which was then pending included not only this suit and a similar suit brought by Bailey in the Supreme Court of the District of Columbia with reference to a part of the $550,000 given to Mrs. Barnett, but, also, a suit brought by Mrs. Barnett in this court to establish the validity of the gift of $550,000 to the defendant

242 mission society and a similar suit brought by her in the Supreme Court of the District of Columbia to establish the validity of the gift of the $550,000 to her. It was quite true, therefore, that the legal questions would be settled in the litigation then pending, as stated in Secretary Work's letter. But obviously it could not be expected that the questions would be settled right unless there was an adequate presentation of Barnett's side, and it was that fair presentation of that side which Secretary Work sought to prevent.

In this connection attention is also called to Secretary Work's letter to the Attorney General dated February 7, 1925, in which he requested the Attorney General to decline my request for the Attorney General's co-operation and assistance in the litigation. (Pltff.'s Wash. dep., pp. 867–868.) Our efforts to secure the assistance of the Department of the Interior thus ended in failure and left us to carry the burden of the litigation as best we might. During this same period, as above stated, Mr. Cochran and I were carrying on our efforts to secure the assistance of the Department of Justice. In addition to personal interviews we prepared and submitted a letter or memorandum of 12 closely written typewritten pages setting forth such of the facts as we had then learned an authorities as to the law.

As appears from the record herein, Attorney General Stone announced on February 9, 1925, in a letter to Secretary Work, that he thought the distribution of the $1,100,000 was entirely unauthorized and that it was the duty of the Government to use its best efforts to assist in recovering the same. (Pltff.'s Ex. 141, pltff.'s Wash.

243 dep., pp. 780–781.) However, no actual assistance came from the Department of Justice, and as late as April 16, 1925, that department, by Emory R. Buckner, United States attorney; Isaac K. Wells, Assistant Attorney General, and H. L. Underwood, special assitant to the Attorney General, filed an answer on behalf of Secretary Work and Commissioner Burke to the bill filed in this court by Mrs. Barnett as alleged prochein ami of Jackson Barnett. That bill was verified by M. L. Mott and was signed by M. L. Mott and L. O. Lyttle as plaintiff's counsel (the plaintiff being Jackson Barnett by his prochein ami, Anna Laura Barnett). Paragraph 37 of that bill alleged that Jackson Barnett, being "of a disposing mind, realizing those who were entitled to his bounty and the effect of a gift upon his estate, did request in writing that out of the aforesaid trust fund in the hands of the Department of the Interior of the United States certain gifts should be made" (referring to said gifts of $1,100,000), and that said gift was approved by the Department of the Interior. With respect to that paragraph of said bill, the answer so filed as aforesaid set forth:

"Answering paragraph 37 of said bill they admit the defendant Jackson Barnett made the request in writing therein described, and that departmental approval and sanction was given to the disposition of the designated property of Jackson Barnett as therein specified. Further answering the allegations in said paragraph these

defendants aver that prior to the approval of these gifts the said Jackson Barnett appeared in person before the then Assist-
244 ant Secretary of the Interior F. M. Goodwin, to whom was assigned, pursuant to the authority of the Secretary of the Interior, the direction and supervision for the Secretary of the Interior of matters relating to Indian affairs; that the said F. M. Goodwin had at that time discussed with said Jackson Barnett the proposed gifts for which he had requested departmental approval; that as a result the said Goodwin was convinced that the said Jackson Barnett fully understood the nature, purpose, and effect of the gifts proposed and that he was of sufficient mental competency to dispose of this property. Based upon such conviction, so induced, the said F. M. Goodwin did approve of such disposition of said property."

Said answer further stated:

"But, further answering, these defendants aver that at the time that these transactions occurred and the approval of the Department of the Interior was given to these gifts the officials who passed upon the matter did believe and were of opinion, and now are, that the action taken by them in the matter was within their authority and discretion, and these defendants are likewise of that opinion and share that belief."

It should be noted in this connection that Secretary Work and Commissioner Burke probably were not subject to said suit, but they nevertheless voluntarily appeared and answered as above stated. It should be said, also, by way of explanation,
245 that Bailey, the Equitable Trust Company, and the mission society were named as defendants in that suit, but so far as the record shows no process ever was served upon them and they did not appear, and the suit was never pressed and subsequently was discontinued.

As late, however, as April, 1925, it appeared that we could look for no assistance in the prosecution of this suit from either the Department of the Interior or the Department of Justice, and certainly would receive no funds with which to carry on the suit.

In March, 1925, a bill was filed in the United States District Court for the Eastern District of Oklahoma in the name of Jackson Barnett "by his next friend and prochein ami R. B. Drake, chief United States probate attorney for the Five Civilized Tribes in Oklahoma," against Bailey, O'Hornett, and the county judge of Okmulgee County, in which it was set forth that Bailey "contrary to his duty in the premises" had subjected Barnett's estate to numerous litigations and attempted to encumber the same with costs by bringing this suit and others with reference to said gift of $1,100,000. The bill prayed, among other things, that Bailey be enjoined from having, holding, or asserting any control over Barnett's funds. The attorneys who filed that bill were M. L. Mott and L. O. Lyttle. Mr. Cochran and I appeared for Bailey and secured a dismissal of that suit.

In March, 1925, proceedings were commenced in the County Court of Okmulgee County to vacate Bailey's appointment as guardian and to have it adjudged that as to the funds here in
246 question the Secretary of the Interior was the paramount guardian of Jackson Barnett and had exclusive jurisdiction over the same. Those proceedings, also, were commenced by Mott and Lyttle in the name of Barnett through Drake as alleged next friend and as chief probate attorney, and the defendant mission society joined therein and asked the same relief.

In September, 1925, there was filed in the Supreme Court of Oklahoma a petition for a writ of prohibition, the plaintiffs in which were "R. B. Drake, chief probate attorney for the Five Civilized Tribes in Oklahoma; Jackson Barnett by R. B. Drake, chief probate attorney for the Five Civilized Tribes in Oklahoma, Jackson Barnett in his own proper person, and the American Home Baptist Mission Society, a corporation," and the defendants in which were "W. A. Barnett, county judge of Okmulgee County, and E. S. Bailey, purported guardian of Jackson Barnett as an incompetent." The attorneys who filed the petition were Mr. Lyttle, Mr. Rogers, and the firm of Lydick, McPherren & Wilson, the Lydick of that firm being a former judge of the Supreme Court of Oklahoma. The petition set forth the $1,100,000 gift, alleged that Barnett was of disposing mind and realized those who were entitled to his bounty and the effect of a gift upon his estate, alleged that Bailey "as guardian" had commenced this action to recover the $550,000 given to the mission society and had brought other suits to recover the $550,000 given to Mrs. Barnett, alleged that unless prohibited Bailey would continue to prosecute said suits" and harass and un-
247 lawfully interfere with the administration of such estate and said restricted funds by the Secretary of the Interior," and prayed, among other things, that the court find that "the exclusive power and jurisdiction to administer the fund herein involved lies in the Secretary of the Interior and the Department of the Interior of the United States of America," and that the County Court be prohibited from exercising jurisdiction with reference to the person and estate of Barnett, and that the court issue its writ of prohibition directing the county judge and Bailey "to cease interfering with the rest of the funds of the said Jackson Barnett now in the hands of the Secretary of the Interior or heretofore in the hands of the Secretary of the Interior of the United States of America."

While I never believed that, as a matter of law, a vacating of Bailey's appointment as guardian or the issuance of such a writ of prohibition would prevent the prosecution of this suit, it was obvious that the prevention of such prosecution was the object sought and that it would be contended by the defendants herein, or at least by the defendant mission society, that the prosecution of this suit by Bailey would cease if the guardianship were vacated or the writ of prohibition issued. As an indication of that it is sufficient to point out that the mission society would have no motive in joining in the

attack upon the validity of Bailey's appointment as guardian or in joining in the petition for a writ of prohibition except its desire to have the prosecution of this suit stopped. Furthermore, the pendency of said petition for a writ of prohibition and of said proceed-
248 ings to vacate Bailey's appointment were specially set up in this court in opposition to the motion which was made herein for an allowance of expense money for the prosecution of the suit. (See affidavits of Charles S. Fettretch and Harrison Tweed, verified October 26, 1925, now on file herein.) That the object of the petition for a writ of prohibition was to stop the prosecution of this suit is further shown by the fact that when the petition was presented and Mr. Cochran and I asked for a continuance of two weeks in order to prepare to oppose it the attorneys who presented the petition insisted that in the meantime no steps should be taken in this case, and in order to obtain the continuance Mr. Cochran and I were forced to agree that during that interim no proceedings in this suit would be taken. In consequence of that agreement the application for expense money herein was, in fact, delayed and was not brought on until after the agreement had been complied with.

It was likewise obvious that the attempt, both in the prohibition case and in the proceedings to vacate the guardianship, was to secure from the courts of Oklahoma an adjudication that the Secretary's authority over the funds here in question was paramount and exclusive and could not be reviewed or questioned in any court, and thus obtain a persuasive, if not controlling, precedent upon issues raised by the defendants in their answer to this suit. And if the writ of prohibition had been issued as prayed for, the Supreme Court of Oklahoma might have regarded further prosecution of this suit by Bailey as disobedience to such writ, even though the prosecution was by Bailey as next friend instead of by Bailey as guardian.

249 It thus was in the highest degree essential to the proper prosecution of this case that the petition for writ of prohibition and the proceedings to vacate the guardianship be vigorously opposed, and the services rendered in opposing them were thus essentially and in substance part of the prosecution of this case.

Those services were extensive and occupied a great amount of time, both for Mr. Cochran and myself from March, 1925, to February, 1927. In addition, we specially retained in the prohibition case the firm of ex-Judge Sharp, of the Supreme Court of Oklahoma.

In order that the court may see the vast amount of work done in litigation in Oklahoma I submit the following brief synopsys of those proceedings.

In opposition to the motion to vacate the guardianship Mr. Cochran and I prepared and filed a motion to remove Mr. Drake as next friend of Jackson Barnett for the reason that he was acting in the interests of Barnett's adversaries, namely, Anna Laura Barnett and the American Baptist Home Mission Society. That motion recited in detail the history of the transaction as disclosed by the

record in this case and consisted of about 20 typewritten pages. Mr. Cochran and I appeared in the County Court and argued this motion at length and write a brief in support of it. The argument lasted nearly an entire day. The County Court sustained our motion. The motion above referred to also included a demurrer to the action of Drake in so far as he appeared in his official capacity and the argument on that question was made at the same time, and the demurrer was sustained.

250 The County Court, having thus ousted Drake, appointed a member of the bar of Okmulgee County as guardian ad litem to investigate and report upon Jackson Barnett's alleged cause of action for the vacating of the guardianship. The guardian ad litem then took of the prosecution of the motion and a hearing was had before the County Court at which the guardian ad litem presented evidence in support of the alleged invalidity of the guardianship and Mr. Cochran and I presented evidence and argued in support of the validity. That hearing consumed an entire day, and the County Court denied the motion to vacate.

Mr. Lyttle then filed a new motion in the name of Jackson Barnett, praying for substantially the same relief as had been prayed for by Drake. In opposition to that motion Mr. Cochran and I prepared and filed a motion to dismiss upon the ground (a) that Barnett was incompetent to employ Lyttle as his attorney, and in addition to the adjudication then under attack had been adjudged incompetent in California in July, 1924, the validity of which latter adjudication was recognized by Mr. Lyttle; and (b) because the proceeding was instituted without the knowledge or consent of Jackson Barnett and in the furtherance of the interests of his adversaries. Mr. Cochran and I appeared and argued that motion and wrote a brief in support of it. The argument lasted approximately half a day. There was also a hearing at which the testimony of Mr. Lyttle was taken. Our motion was sustained.

After Drake was ousted the defendant mission society filed
251 a motion similar to the one filed by Drake and asked the same relief. In opposition to that motion Mr. Cochran and I prepared and filed a motion to dismiss upon the ground that the mission society had no legal standing to attack the validity of the guardianship proceedings, and also prepared a brief in support thereof. That motion also was argued orally by Mr. Cochran and me, and our motion was sustained.

Three appeals from the orders of the County Court were taken to the District Court of Okmulgee County, where, under the law of Oklahoma, the matters were triable de novo. One appeal was taken by Drake, one by Lyttle as alleged attorney of Barnett, and another by the guardian ad litem.

In the District Court Mr. Cochran and I prepared and filed motions to dismiss the appeals taken by Mr. Lyttle and by Mr. Drake. A hearing was had upon those motions, evidence was taken and

arguments were made. The hearing consumed practically an entire day, Mr. Cochran and I both participating. The District Court dismissed the appeals. That was in July, 1925.

From the orders of the District Court dismissing the appeals of Mr. Lyttle and Mr. Drake they appealed to the Supreme Court of Oklahoma. No appreciable amount of work was done in connection with those appeals to the Supreme Court until July, 1926. Before stating those services, therefore, I will narrate the services in the prohibition case, which extended from September, 1925, to July 1926.

The petition for writ of prohibition was filed as an original action in the Supreme Court of Oklahoma in September, 1925, as above stated.

252 The petition covered 81 printed pages, including exhibits.

Mr. Cochran and I prepared a motion to dismiss which covered 47 typewritten pages, including exhibits. We also prepared the response of the county judge, which covered 56 typewritten pages, including exhibits. The questions raised by the petition for prohibition were exceedingly numerous. Many of them were highly technical, but at the same time exceedingly novel and such as are not ordinarily met with in the usual course of practice. Others involved the very broad and complicated subject of the relationship of the County Courts of Oklahoma and the Secretary of the Interior in the administration of Indian affairs.

In order that the court may see the number and complicated character of the questions presented, I append hereto, as Exhibit A of this affidavit, a copy of the summary of the propositions as set forth in the brief which we subsequently submitted to the Supreme Court in opposition to the petition.

In October, 1925, there was an oral argument upon our motion to dismiss the petition, in which argument Mr. Cochran, Judge McCrory, Judge Sharp, and I all participated. The argument was had before the full bench of the Supreme Court of Oklahoma, and lasted for two days, which was most unusual in cases before that court. The counsel who appeared in support of the petition were Mr. Rogers, Mr. Lyttle, and ex-Judge Lydick. At the conclusion of the argument the court directed the filing of briefs. Mr. Cochran and I then prepared a brief for the defendants, with the assistance of Judge McCrory and Judge Sharp. That brief covered 260

253 printed pages. We also prepared a supplemental and reply brief of about 30 printed pages. After the briefs were filed there was a further oral argument before the full bench of the Supreme Court which lasted four hours and in which Mr. Cochran, Judge McCrory, and Judge Sharp and I all participated on behalf of the defendants; Mr. Rogers and Mr. Little and Judge Lydick on behalf of the plaintiffs. That second argument was had in April, 1926.

Between the first and second oral arguments before the Supreme Court there was a long series of motions and other interlocutory

proceedings. Drake withdrew from the case. The defendant mission society filed objections to his withdrawal and a protest against the withdrawal was filed in the name of Jackson Barnett by Mr. Lyttle. A reply to such objection and protest was prepared and filed by Mr. Cochran and myself and our associates, which reply included a brief. The California guardian petitioned for leave to intervene in the case, and Mr. Cochran and I and our associates prepared and filed objections thereto and a brief in support of our objections. Mr. Lyttle and Judge Lydick also made a motion for the appointment of a guardian ad liem for Jackson Barnett, and Mr. Cochran and I and our associates prepared and filed objections to that application, with a brief in support thereof. The plaintiffs in the case also moved to consolidate the cause with the two appeals from the District Court above mentioned, and Mr. Cochran and I and our associates prepared and filed a response to that motion, with a brief in support of our response.

The petition for the writ of prohibition was finally denied by the Supreme Court in July, 1926.

254 I return now to the further proceedings in the Supreme Court upon the appeals taken to that court from the District Court in the matter of vacating the guardianship. During the month of July, 1926, I wrote, with the assistance of Mr. Cochrane and Judge Sharp, a brief in opposition to those appeals, consisting of about 40 typewritten pages. In November, 1926, the Supreme Court handed down a decision reversing the lower courts and declaring the appointment of O'Hornett invalid because on order of the District Court had been entered in vacation instead of in term time. After the announcement of that decision I prepared and submitted, with the assistance of Mr. Cochran and Judge Sharp, a petition for re-hearing, and brief in support thereof, consisting of 100 printed pages. The preparation of such petition and brief, despite all my previous work upon the case, consumed three weeks. In order that the court may see the character of the questions involved in that case, I append hereto, as Exhibit B of this affidavit, a summary of the propositions as set forth in said last-mentioned brief.

While those proceedings were being carried on in the courts of Oklahoma, Mr. Cochran and I made further efforts to secure the assistance of the Department of Justice in the prosecution of this case, and in November, 1925, we went to Washington and spent a number of days in endeavoring to effect that object. At that time Attorney General Stone and Assistant Attorney General Wells both had retired from the department, and it became necessary to take up the matter practically anew with other officials. We collated

255 and presented documents and memoranda as to the facts and authorities as to the law and urged upon them what we conceived to be the duty of the department in the matter. While in Washington for this purpose we utilized the occasion of our nearness to New York for the purpose of coming here and conferring with Mr. Walter as to the prosecution of this case.

As a result of our efforts the Department of Justice finally intervened in this case and in the prohibition case in Oklahoma, and united with us in asking that the writ of prohibition be denied and that the gift here attacked be set aside.

We had every reason to believe that the right and standing of the United States to intervene in this case in opposition to the validity of the gift would be questioned, and subsequently turned out to be the fact; and that question, as well as the questions going to the merits of this case, necessarily had to be considered, and was considered and investigated in our conferences with the officials of the Department of Justice.

The assistance which the Department of Justice thereafter rendered in the proceedings in Oklahoma and in the prosecution of this case was helpful, and I want to record here on behalf of my associates and myself our personal appreciation of the friendly spirit of co-operation which has existed between us and the representatives of the department in Washington, in Oklahoma, and in New York. We have no desire to minimize the extent or importance of that co-operation. At the same time it must be said in fairness to ourselves that the real burden of going forward with the suit and pressing it to a successful conclusion has fallen upon us, as I
256 think the record and the proceedings at the trial will abundantly show to the court. And I have no hesitation in saying that if it had not been for the persistency of Mr. Cochran and myself in pressing the matter before them the Department of Justice never would have taken any action to recover the $1,100,000 or any part of it. Indeed, it is not too much to say that but for our activities the matter in all probability never would have been brought to the attention of the Department of Justice in such fashion that any cognizance of it would have been taken by any responsible official.

Referring again to my contract with Bailey already mentioned above, I desire to state that when the proposed contract was submitted to the County Court of Okmulgee County for its approval the percentage of the recovery to be paid as compensation for services was left blank, and the forty per cent now appearing therein was fixed by the court itself, and, as appears from the endorsement on the contract, the contract in its completed form was approved by that court. In this connection I further state that here is a statute in Oklahoma expressly authorizing contingent fee contracts for not exceeding fifty per cent of the recovery, and it was then and is now a usual and prevalent practice in Oklahoma for attorneys taking cases on contingent fees to stipulate for fifty per cent of the recovery. The forty per cent was fixed in this case because the amount involved was unusually large. It is proper to add, however, that at the time said contract was made no attack was expected upon the validity of the guardianship, nor was it contemplated that there would be any such litigation as that necessitated by the presentation of the

257 petition for a writ of prohibition. In short, the amount of work required in order successfully to prosecute this case has far exceeded what was anticipated at the time the contract was made.

In connection with the services above enumerated the following expenses have been necessarily incurred and actually paid by me or my firm:

(1)	Stenographer's fees for taking depositions	$726.19
(2)	Notary fees for taking depositions	50.75
(3)	Expenses of service subpœnas, fees, and mileage of witnesses	258.45
(4)	Certified copies of documents obtained for the purpose of offering in evidence in this case	78.75
(5)	Telegrams, telephones, postage, and expressage	67.64
(6)	Traveling expenses on 3 trips to Murkogee	17.75
(7)	Traveling expenses on trip to Tulsa	6.00
(8)	Traveling expenses on trip to Tulsa, Coffeyville, and Washington, D. C., in June, 1926, for the purpose of taking depositions	257.00
(9)	Services of local counsel in Coffeyville in serving subpœna upon McGugin, arranging for taking his deposition, and for use of office facilities, etc	25.00
(10)	Traveling expenses on trips to New York in October, 1926, and November, 1926, and additional trip to Washington in October, 1926, in connection with trial of this case	545.00
258 (11)	Traveling expenses on 9 trips from Henryetta to Oklahoma City in connection with the prohibition case and the appeal cases in the Supreme Court of Oklahoma	178.00
(12)	Traveling expenses on 27 trips from Henryetta to Okmulgee in connection with prohibition case and proceedings to vacate guardianship	38.00
(13)	Printing petition for re-hearing and brief in support thereof in appeal cases in Supreme Court of Oklahoma	75.00
(14)	Traveling expenses on trip to Washington and New York in January, 1925	380.00
(15)	Traveling expenses on trip to Washington and New York in November, 1925	265.00
(16)	Traveling expenses on trip to New York in August, 1927, in connection with this application for allowance	200.00
	Total	3,168.53

I kept no accurate record of the expenses enumerated as items (11) and (12), and I do not know the exact amount thereof, but I do know that the actual expenses represented by said items are in excess of the amounts stated.

259 All the expenses above enumerated were necessarily incurred and actually paid, and are reasonable in amount; and no part thereof has been paid except the $2,000 paid by Equitable Trust Company pursuant to the order herein of March 2, 1926. Items (1) to (10), inclusive, were directly and exclusively for the prosecution of this particular suit. Items (11), (12), and (13) were for the benefit of this case for the reasons above stated, and the nature of the proceedings to which those items relate is such that no reimbursement can be obtained in those proceedings. Item (14) was primarily for the benefit of this case, although upon that trip certain services in connection with the suit in the Supreme Court of the District of Columbia were performed. Item (15) was primarily for the benefit of this suit because that trip was made for the purpose of

securing the intervention of the Department of Justice in this suit, and actually resulted in bringing about such intervention as well as their intervention in the prohibition case.

RAYBURN L. FOSTER.

Sworn to before me this 24th day of August, 1927.

ETHEL JOHNES,
Notary Public, Kings County No. 152.

Certificate filed New York County No. 81.
New York County register's No. 9067.
Kings County register's No. 9053.
Commission expires March 30, 1929.

260 *Exhibit to affidavit of R. L. Foster*

Contract (referred to in affidavit of Mr. Foster)

This agreement, made and entered into on this 11th day of December, 1924, by and between E. S. Bailey, guardian of Jackson Barnett, an incompetent, party of the first part, and Hummer & Foster, a copartnership composed of R. B. F. Hummer and R. L. Foster, parties of the second part, witnesseth:

That whereas on the 29th day of April, 1912, Jackson Barnett was duly adjudged an incompetent by the County Court of Okmulgee County, Oklahoma, and Carl J. O'Hornett was duly appointed as the guardian of the person and estate of the said Jackson Barnett, who duly qualified as such guardian and continued to act in that capacity until the 13th day of June, 1924, at which time he resigned;

And whereas on the 13th day of June, 1924, E. S. Bailey was duly appointed by the County Court of Okmulgee County, Oklahoma, as the guardian of Jackson Barnett, an incompetent, and on the same day duly qualified as such guardian and is now the duly appointed, qualified and acting guardian of Jackson Barnett, an incompetent;

And whereas the said Jackson Barnett is a citizen of the Creek Nation and as such citizen of the Creek Nation was allotted the following described real estate located in Creek County, State of Oklahoma, to wit:

Southeast quarter (SE/4) of section five (5), Township seventeen (17) north, Range seven (7) east;

261 And whereas said premises were duly leased for oil and gas purposes by Carl J. O'Hornett, former guardian of Jackson Barnett, upon departmental form and which lease was duly approved by the county court of Okmulgee County and the Secretary of the Interior, wherein certain royalties were reserved for the oil and gas produced therefrom;

And whereas, pursuant to the terms of said lease, oil and gas wells were drilled upon said premises and large quantities of oil and gas produced and royalties were paid thereon as by the terms and con-

ditions of said lease to the superintendent of the Five Civilized Tribes, for the use and benefit of Jackson Barnett, an incompetent, which sums on and prior to the 15th day of December, 1922, were in excess of the sum of $1,100,000.00;

And whereas during the month of February, 1922, Anna Laura Lowe, together with accomplices, enticed and forced the said Jackson Barnett into an automobile and transported him to the States of Kansas and Missouri, and in each State the said Anna Laura Lowe entered into an alleged marriage relation with said Jackson Barnett, and since said time has continued to keep the said Jackson Barnett away from his habitation, his accustomed environment and the association of the members of his tribe, and from his guardian, and has kept him under the influence, duress, and restraint of herself and her counsel and associate;

And whereas, on or about the 15th day of December, 1922, a certain letter was written by the said Anna Laura Barnett, her
262 associates, or counsel, addressed to the Secretary of the Interior, purporting to be written by the said Jackson Barnett and requesting the Secretary of the Interior to give to Anna Barnett out of the estate of said incompetent the sum of $550,000.00 and to give to the American Baptist Home Missionary Society out of said estate the sum of $550,000.00, which said letter purports to be signed by the thumb mark of said Jackson Barnett;

And whereas the Secretary of the Interior or his assistant, presumably pursuant to said purported letter of Jackson Barnett, caused the sum of $550,000.00 to be delivered to Anna Barnett and the sum of $550,000.00 to be delivered to the American Baptist Home Mission Society, either in cash or in bonds, into which the said Secretary of the Interior had theretofore invested the funds of the said Jackson Barnett, and said funds and said bonds being taken out of the estate of said incompetent in the hands of the Secretary of the Interior or the Superintendent of the Five Civilized Tribes;

And whereas it is believed that said mental incompetent was incapable of understanding the letter aforesaid or the transactions therein involved and was under the undue influence, duress, and restraint of said Anna Laura Barnett and was thereby induced to affix his thumb mark to said instrument;

And whereas the action of the Secretary of the Interior in surrendering said funds pursuant to said letter in the absence of the consent of the guardian of said Jackson Barnett and without
263 an order of the County Court of Okmulgee County, Oklahoma, regardless of the question of whether or not the said incompetent understood the said letter and the transactions therein involved and regardless of whether he was under the influence, duress, and restraint of the said Anna Barnett, was without authority of law, and said funds were illegally and unlawfully extracted from the estate of said Jackson Barnett;

And whereas the sum of $200,000.00 of said funds are now in deposit in the Riggs National Bank, of Washington, D. C., pursuant to a certain trust agreement between the said Anna Laura Barnett and Jackson Barnett, whereby the said Jackson Barnett is to receive a certain income therefrom during his lifetime and the sum of $550,000.00 is on deposit in the Equitable Trust Company of New York City, pursuant to a trust agreement between The American Baptist Home Mission Society and Jackson Barnett, whereby the said Jackson Barnett is to receive a certain income from said funds during his lifetime and the balance of said funds, in the amount of $350,000.00 have been distributed between Anna Barnett and her counsel;

And whereas the party of the first part is without sufficient funds belonging to said estate to pay the necessary fees for legal services which will be required in recovering said funds due to the fact that said party of the first part has been unable to secure the cooperation and assistance of the Secretary of the Interior or the Superintendent of the Five Civilized Tribes, who are withholding
264 from the party of the first part all sums of money in their possession belonging to said incompetent and are refusing to advance any sum of money or to take any action to recover said funds;

And whereas the party of the first part desires to take such action as may be advisable for the recovery of said funds and has been duly authorized by the County Court of Okmulgee County by an order entered therein on the 11th day of December, 1924, in probate cause No. 1018, to take such action as he deems advisable for the recovery of said funds or so much thereof as can be found or traced into other property, and has been authorized to employ counsel;

Now, therefore, the party of the first part, by and with the consent of the County Court of Okmulgee County, Oklahoma, does hereby employ the parties of the second part for the purpose of taking such action as they may deem advisable for the recovery of said funds, and for that purpose to interview the various interested parties and to file such suit or suits in such courts and in such States and against such persons as said attorneys may deem advisable, giving said attorneys full authority to institute suit in the name of the party of the first part and to prosecute the same to completion, giving said parties of the second part full and complete authority in the management of said actions, provided, however, that no compromise of said action shall be made except by and with the consent of the party of the first part and the county court of Okmulgee County, Oklahoma. Parties of the second part are further authorized to employ such other legal counsel as they may deem advisable, at their own expense.

265 In consideration of the services to be rendered by the parties of the second part the party of the first part does hereby agree

to pay to said parties of the second part a sum equal to forty per cent of such amount as may be recovered by virtue of their efforts, whether by final judgment, or by compromise, or otherwise, and the party of the first part does hereby transfer, assign, convey, and set over unto the parties of the second part, their heirs and assigns, forty per cent of the causes of action of the said Jackson Barnett for the recovery of said sums or any part thereof.

Party of the first part further agrees to advance the necessary court costs in the filing of said actions, and agrees to advance or to reimburse parties of the second part for their reasonably necessary expenses in performing their duties under this contract to such an extent and at such times as funds belonging to said incompetent may come into the hands of the party of the first part.

Parties of the second part hereby accept the employment upon the terms and conditions as above set out and agree to use due diligence in the prosecution of the causes of action of the said Jackson Barnett to final termination.

This agreement shall be binding upon the estate of Jackson Barnett, his heirs, executors, administrators, trustees, and assigns.

In witness whereof the parties have hereunto set their hands the day and year above written, concurrently with the order of the
266 County Court of Okmulgee County, Oklahoma, authorizing the execution of this contract.

E. S. BAILEY,
Guardian of Jackson Barnett,
Party of the First Part.

_____,

R. L. FOSTER,
Parties of the Second Part.

STATE OF OKLAHOMA,
Okmulgee County, ss:

Before me, the undersigned, a notary public in and for said county and State, personally appeared E. S. Bailey, R. B. F. Hummer, and R. L. Foster, to me known to be the identical persons who executed the within and foregoing instrument and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal this day of December, 1924.

_____, *Notary Public.*

My commission expires

This contract examined and approved by the county court of Okmulgee County, Oklahoma, concurrently with the order of this court of this date, authorizing the execution of the same.

W. A. BARNETT, *County Judge.*

[Seal of Okmulgee County Court.]

267 *Exhibit A, attached to affidavit of Mr. Foster*

Summary of propositions set forth in brief in opposition to petition for writ of prohibition in Supreme Court of Oklahoma

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Congress has conferred upon the County Courts of Oklahoma full and competent jurisdiction of the guardianship of minors and incompetents, whether Indians, freedmen, or otherwise; and such courts have jurisdiction of the lands and property of full-blood incompetent Indians, whether such lands or property be so-called restricted or unrestricted; and the Secretary of the Interior is without authority to promulgate any rule or regulation depriving the County Courts of such jurisdiction 171

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278 *Exhibit B, attached to affidavit of Mr. Foster*

Summary of proposition set forth in brief on rehearing in Supreme Court of Oklahoma in proceedings relative to vacating the appointment of the guardian

I

The court erred in holding that the District Court erroneously dismissed the appeal of L. O. Lyttle on behalf of Jackson Barnett for the following reasons:

A. Because Barnett is in fact incapable of taking care of himself and managing his property as evidenced by the order appointing guardian in California, to which this court under the Constitution is bound to give full faith and credit; Barnett is therefore incapable of conducting this litigation, and must be represented by next friend or guardian ad litem. The County Court having designated W. C. Alley as guardian ad litem, L. C. Lyttle was without authority to take any action on behalf of Barnett.

B. Except as any person may bring an action as next friend of an incompetent person, subject to the power of the court over such next friend—to remove him or to stay the action—there is no authority for L. C. Lyttle to represent Barnett, his sole authority being derived from a power of attorney executed by Barnett, which is void under the laws of California and of Oklahoma, it having been made after the appointment of guardian in California.

279 II

The court manifestly erred in deciding the case upon issues not presented to the trial court and which could only arise upon the

hearing of the case upon its merits, to wit: The validity or invalidity of the guardianship. The only question properly before this court was the validity of the order of the District Court dismissing the appeals of L. O. Lyttle and H. B. Drake on behalf of Jackson Barnett, which was specifically brought to the attention of the court in the brief of defendant in error at pages 3 and 16 thereof. In passing upon the validity of the guardianship, this court accepts as conclusive that portion of the records attached to the motion to vacate the appointment of guardians for Jackson Barnett without affording defendant in error an opportunity to plead or prove other portions of the record in said guardianship proceedings, or to show by other competent evidence all that was had and done in the course of said probate proceedings.

III

Assuming, for the purpose of argument, that this court has jurisdiction on this appeal to pass upon the validity or invalidity of the guardianship, the court erred in its opinion in holding that the order of September 5, 1912, was made in vacation for the following reasons:

A. Because the opinion is based upon evidence which does not appear in the record. The court states in its opinion that the District Court adjourned on August 7, 1912, and that thereafter
280 the clerk's journal showed orders made "in vacation"; the record does not show that the District Court adjourned on August 7, nor does it show the words "in vacation" on the clerk's journal.

B. Even though the record in this case were the same as the record in the prohibition case (No. 16,784, in this court, which record the court has undoubtedly confused with the record in this case), still the court erred in holding that the order of September 5, 1912, was made in vacation for the following reasons:

1. The motion to vacate the guardianship having been filed more than three years after the order appointing guardians was made, cannot be sustained unless the invalidity of the guardianship affirmatively appears from the face of the record—the judgment roll. If it is necessary to resort to any evidence other than the judgment roll to show the invalidity of the guardianship, the motion to vacate cannot be sustained.

2. The judgment roll (to which alone the court may look to ascertain whether the judgment in this case is void) consists of the record required to be kept under the provisions of section 686 and 688, inclusive, C. C. S., 1921, which consists of the petition, the process, the return, the pleadings subsequent thereto, reports, verdicts, orders, judgments, and all material acts and proceedings of the court. This does not include the clerk's notation "In vacation" at the top of the page of the journal, even though made to appear in the case made.

281 3. In support of the judgment of the District Court of September 5, 1912, every possible presumption should be indulged to uphold it. It will be presumed that all facts and conditions necessary to uphold the judgment existed unless such facts or conditions are affirmatively negatived by the record. It follows that inasmuch as the judgment roll does not show affirmatively that the order was made "in vacation," it is conclusively presumed that it was made in open court, in term time.

4. The District Court having properly convened at the beginning of the term continued in session until the next regular term of court, unless adjourned sine die. The order of August 7 is not an adjournment sine die, and hence the court was in session on September 5, 1912.

5. Because the District Court was in fact in session on September 5, 1912, which can and will be proved if this court will permit the case to be tried de novo in the District Court as the statute requires.

IV

The court erred in holding that the District Court had no jurisdiction to enter the order of September 5, 1912, on account of the fact that the so-called "mandate" of the District Court had been filed and recorded in the County Court on July 1, 1912, for the following reasons:

282 A. Because it is not shown that any valid order of the District Court of June 24, 1912, was ever rendered or entered in the District Court, and the purported copy thereof as filed in the County Court is not a copy of an order of the District Court. This for the reason that the only evidence in the record of such purported order is a purported copy thereof shown on page 16 of the case made, which does not show that the original was ever filed or recorded in the District Court, and it is therefore a nullity.

B. Because the copy of the purported judgment of June 24, 1912, as filed in the County Court, is not a certified copy thereof as required by said order.

C. Because the statute does not authorize the issuance of a mandate by the District Court on appeal from the County Court where the order of the County Court is reversed in its entirety and where there is no judgment left to execute. The mandate is not required to show that the order of the County Court has been vacated because it is vacated when the appeal is taken.

D. Because if the record shows a valid order of the District Court entered on June 4, 1912, and if the uncertified copy thereof as filed in the County Court operates as a mandate the same was vacated and recalled by the order of September 5, 1912.

283 In United States District Court

[Title omitted.]

Affidavit of Almond D. Cochran in support of application for allowances

STATE OF NEW YORK,
County of New York, ss.:

Admond D. Cochran, being first duly sworn, deposes and says: I reside in Okmulgee, Oklahoma. I was admitted to the bar of that State in 1908, and have been engaged in the practice of the law there since that date. I am also a member of the bar of the State of Missouri and of the bar of the Supreme Court of the United States. At all the times hereinafter mentioned I was a member of the firm of Cochran & Ellison, which firm recently was dissolved by the death of Mr. Ellison.

In November, 1924, Mr. R. L. Foster of the firm of Huinmer & Foster, attorneys of Henryetta, Oklahoma, legal representatives of Elmer S. Bailey, at that time the newly appointed guardian of
284 Jackson Barnett, incompetent, consulted my firm with reference to Barnett's alleged gift of $1,100,000 of Liberty loan bonds set forth in the pleadings and evidence herein and with respect to the bringing of suits for the recovery of those bonds or their proceeds, and arranged for the assistance and cooperation of my firm in bringing and prosecuting such suits. It was recognized and agreed that compensation for services in so doing would have to be contingent upon success because, as pointed out in the annexed affidavit of Mr. Foster, there was no other means of obtaining such compensation.

From that time until January, 1927, a large part of my time has been devoted to the task of recovering those funds. The various litigations involved in that undertaking, including suits for the recovery thereof and proceedings instituted by our opponents in opposition thereto, may be briefly enumerated as follows:

1. This suit relating to $550,000 thereof.

2. A suit in the Supreme Court of the District of Columbia against the Riggs National Bank to recover $200,000 thereof, being a part of the $550,000 given to Mrs. Barnett;

3. A suit in the United States District Court for the district of Kansas against Harold McGugin to recover $150,000 thereof, being the amount believed to have been transferred to McGugin out of the $550,000 given to Mrs. Barnett;

4. A suit in the District Court of Okmulgee County, Okla-
285 homa, against M. L. Mott, to recover the $15,000 which he admits having gotten out of the $550,000 given to Mrs. Barnett;

5. A suit in the United States District Court for the District of California against Mrs. Barnett to impress a trust upon certain real estate in which it is believed that she invested a part of the balance given to her;

6. A suit brought in this court by Mrs. Barnett in the name of Jackson Barnett by herself as his prochein ami to establish the

validity of the gift to the defendant Home Mission Society and enforce the trust concerning the same;

7. A suit brought in the Supreme Court of the District of Columbia by Mrs. Barnett to enforce the trust under which the Riggs National Bank held $200,000 of the bonds given to her and to establish the validity of the gift to her;

8. A suit brought in the United States District Court for the Eastern District of Oklahoma in the name of Jackson Barnett by R. B. Drake, chief United States probate attorney, as alleged next friend, the object of which in substance was to enjoin the prosecution of said suits for the recovery of said $1,100,000;

9. The prohibition case in the Supreme Court of Oklahoma, more particularly described in the affidavit of Mr. Foster; and

286 10. The several proceedings to vacate the guardianship, which also are more particularly described in the affidavit of Mr. Foster.

None of the litigations above mentioned has been tried except this suit and the prohibition case and the proceedings to vacate the guardianship, and the suit against McGugin has been dismissed without a trial, and the property sought to be reached by the suit numbered "5" above has been sold under mortgage foreclosure, as I am reliably informed and verily believe. Nothing has been thus far recovered, therefore, and the prospect of recovering anything except the $550,000 involved in this suit and the $200,000 held by the Riggs National Bank is remote and discouraging. In the suit to recover the $200,000 held by the Riggs National Bank it was necessary to employ local counsel in Washington, and such counsel have been employed upon an agreement for compensation to be paid out of the recovery therein.

Just about the time my firm was retained, some persons, not in any way connected with Bailey or Mr. Foster, or Judge McCrory or myself, and wholly without our knowledge, made certain charges and accusations against Commissioner Burke with reference to this distribution of $1,100,000 of Barnett's funds and other alleged malfeasances of Commissioner Burke in other Indian matters, and a hearing was had with respect to those charges before a subcommittee of the House of Representatives' Committee on Indian Affairs in January, 1925. Up to that time about all that Mr. Foster and

287 I had been able to learn with reference to this gift was the fact that it had been made and approved by the Secretary without the knowledge or consent or concurrence of the County Court or of the guardian, and that the Secretary had refused to vacate his approval or assist in recovering the funds, or to permit the use of any of the funds of Barnett for that purpose. As to how and by whom the distribution had been engineered we were wholly in the dark. In an effort, therefore, to learn the facts in that regard, Mr. Foster and I attended the hearings before the congressional committee in Washington in January, 1925, and while in Washington on that occasion we also made some independent investigations.

During the same visit to Washington I personally interviewed Secretary of the Interior Work and laid the matter before him and renewed the request for funds with which to prosecute litigation

for the recovery of the money. The request was also submitted in writing both to Commissioner Burke and to Secretary Work, and the request was refused.

During the same visit to Washington Mr. Foster and I prepared and sent to the Attorney General of the United States a long letter reviewing the facts as we had then learned them and presenting our theory of the law, and requesting the assistance of the Department of Justice in the proposed litigation for the recovery of the funds. We also had a number of personal interviews with Assistant Attorney General Wells and other officials of the Department of Justice. We persistently and earnestly endeavored to impress upon them the illegality of the gift and the duty of the
288 Department of Justice to assist us in our efforts to have the same set aside. It was quite apparent that these officials of the Department of Justice were extremely reluctant to "lock horns" with the Department of the Interior and take a position which involved the condemnation of an act of that department, particularly as the Department of the Interior still was insisting upon the propriety and legality of its act and pursuing a policy which was utterly opposed to any attempt to have the gift annulled; and during that visit we received no assurance that any assistance or cooperation from the Department of Justice in our efforts to secure an annulment of the gift would be forthcoming.

While in Washington on that occasion Mr. Foster and I came over to New York. Judge McCrory, who had been subpœnaed to attend the Washington hearings and testify as a witness, accompanied us. We interviewed some of the officers of the defendant mission society and also their counsel, Mr. Fettretch, in an effort to secure a return of the $550,000 amicably and without litigation. We also interviewed the attorneys for the Equitable Trust Company with the same end in view. We were unsuccessful, and we thereupon consulted Mr. Carroll G. Walter, of the firm of Patterson, Eagle, Greenough & Day, with whom I previously had been associated in other litigation, and retained that firm for the purpose of bringing this suit.

No assistance or indication of cooperation had been received from the Department of Justice as late as October, 1925. On the contrary, there had been filed in the suit designated as
289 "Number 6" above an answer which apparently indicated a disposition on the part of the Department of Justice to aid the Department of the Interior in upholding the validity of the gift. That answer is more particularly described in the annexed affidavit of Mr. Foster.

In November, 1925, Mr. Foster and I again went to Washington and had further conference with various officials of the Department of Justice with reference to the setting aside of the gift here in question in an effort to get that department to assist us in the prosecution of the litigation then pending. Those conferences lasted for

approximately two weeks. We again presented the facts and the law, argued as to their effect, urged the duty of the department to assist us, and point out the tremendous opposition with which we were being met, the great difficulty which necessarily inheres in an effort to establish the illegality of an act of a great department of the Government such as had been taken by the Department of the Interior in this case, and the assistance which the Department of Justice could give.

Shortly thereafter the Department of Justice did intervene in this case and also in the prohibition case of Oklahoma.

In December, 1925, L. O. Lyttle, one of the attorneys who has appeared herein as counsel for the defendants, presented to the Judiciary Committee of the United States Senate an elaborate "protest" or "objections" to the confirmation of B. M. Parmenter as Assistant Attorney General, which protest or objections he
290 submitted as coming from Jackson Barnett and signed in the name of Jackson Barnett. In that document Mr. Lyttle, in the name of Jackson Barnett, charged that Mr. Parmenter was guilty of maladministration in office because he had directed or procured the withdrawal of R. B. Drake from the prohibition case, which act, it was therein claimed, would tend to prevent an adjudication establishing the validity of these gifts. Being conversant with the facts involved I went to Washington and assisted Mr. Parmenter in meeting the charges, which he did with complete success. While those services, which consumed about a week of time, may be somewhat remote from this case, I think the matter worthy of mention in order that this court may see the extreme length to which our opponents went in their attempts to prevent a fair and proper prosecution of this suit.

From about February 25th to the middle of March, 1926, I had almost daily conferences with various officials of the Department of Justice in Washington with reference to the evidence to be adduced in support of the prosecution of this case, and on March 10, 1926, I came over to New York and had a conference with Mr. Walter with respect thereto.

In May, 1926, I spent a number of days in examining copies of the letters and documents which had been obtained from the files of the Department of the Interior, and during the same month I furnished to Assistant Attorney General Parmenter at his request a detailed statement of what we expected to develop by means of the depositions which were then in contemplation.

In September, 1926, I went to Muskogee, Oklahoma, and in company with Mr. Foster had an interview with Jackson Barnett.
291 During the months of October, November, and December, 1926, I was in Washington continuously, with the exception of several trips over to New York to confer with Mr. Walter and one or two very short trips back to Oklahoma. Although I had other business in Washington during that period, I had almost daily conferences with officials of the Department of Justice with reference

to the preparation for the trial of this case, the conduct of the trial, and the preparation of the briefs to be submitted on behalf of the plaintiff and on behalf of the United States.

I respectfully ask the court to note that this affidavit is supplementary to the affidavits of Mr. Walter and Mr. Foster hereto annexed. In order not to burden the court with a further detailed recital of all the proceedings in the case and of the services rendered in its prosecution, I refrain from making a more detailed statement of my services as to those matters which are covered in those affidavits. Throughout the prosecution of the case I worked and collaborated with Mr. Foster and Mr. Walter both orally and by correspondence.

In connection with my services the following expenses have been necessarily incurred and actually paid by me or my firm:

(1) Traveling expenses on 11 trips from Okmulgee to Oklahoma City in connection with the prohibition case and the proceedings to vacate the guardianship and for conferences with Special Assistant Shelby	$200.00
292 (2) Traveling expenses on trip to Washington and New York in January, 1925	350.00
(3) Traveling expenses on trip to Washington and New York in November, 1925	325.00
(4) Traveling expenses on 5 trips from Washington to New York	150.00
(5) Telegrams, telephones, and postage	40.00
(6) Traveling expenses on trip to New York in August, 1927	200.00
Total	1,265.00

I have kept no record of most of the foregoing items of expense, and I do not know the exact amount thereof, but I do know that the actual expense is in excess of the amount stated, and that the amounts stated were necessary and were actually paid, and are reasonable in amount. No part thereof has been repaid.

ALMOND D. COCHRAN.

Sworn to before me this 24th day of August, 1927.

ETHEL JOHNES,
Notary Public, Kings County No. 152.

Certificate filed New York County, No. 81; New York County register's No. 9067; Kings County register's No. 9053.
Commission expires March 30, 1929.

293 IN UNITED STATES DISTRICT COURT

[Title omitted.]

Response of United States to application for allowances

Response to the application of the attorneys employed by Elmer S. Bailey for an allowance out of the property of Jackson Barnett for their services as counsel and for their disbursements

Comes now the intervenor herein, United States of America, by its counsel of record and for its response to the application of Patter-

son, Eagle, Greenough & Day, Hummer & Foster, Cochran & Ellison, and McCrory & Monk, attorneys employed by Elmer S. Bailey in the prosecution of this suit for an allowance out of the property described in the decree herein for their services and disbursements, and objects to the making of such allowance for the following reasons:

294 1. Because Jackson Barnett is a full-blood restricted Indian of the Five Civilized Tribes in Oklahoma, and the property and money out of which such allowance is sought is restricted against alienation, except with the approval of the Secretary of the Interior of the United States of America.

2. Because the property described in the decree of the court is subject to restrictions imposed thereon by Congress by the act approved May 27, 1908, 35 Stat. 312; and by reason of the provisions of said act is not subject to alienation, contract to sell, power of attorney, or any other encumbrance prior to April 6, 1931, unless done with the approval of the Secretary of the Interior of the United States of America.

3. Because the Secretary of the Interior of the United States of America is entitled under the decree of the court herein to the return and custody of said property, undiminished by the payment of an allowance of counsel fees.

4. Because the interests of Jackson Barnett were represented in this suit by the United States of America by its counsel acting under and by the direction of the Attorney General of the United States.

B. M. PARMENTER,
Assistant Attorney General.
CHARLES B. SELBY,
Special Assistant to the Attorney General,
CHARLES H. TUTTLE,
United States Attorney.
NAT M. LACY,
Special Assistant to the Attorney General.

295 In United States District Court

[Title omitted.]

Affidavit of Nat M. Lacy on application for allowances

DISTRICT OF COLUMBIA, *ss:*

Comes now Nat M. Lacy, who, being first duly sworn, deposes and says:

I have represented the United States in the above-entitled cause as counsel for the Government as Special Assistant to the Attorney General of the United States. The files of the Department of Justice in this matter were submitted to me on the 15th day of October, 1925, and the matter was assigned to me for attention. Thereafter, in

connection with other counsel of the Department of Justice, I prepared an application on behalf of the United States to intervene in this suit and caused the same, with a petition of intervention of the United States of America, to be filed in this court.

296 This petition was filed, as shown by the records, on the 5th day of December, 1925, and later the court sustained the application of the United States to intervene and ordered the petition of intervention filed.

Prior to the filing of this application and petition I conferred with Mr. Allen D. Cochran and Rayburn L. Foster, as well as with other attorneys and my superior officers in the Department of Justice, relative to the case and the action to be taken by the Government therein. A suggested petition of intervention was prepared by Mr. Cochran and Mr. Foster and given consideration before the petition was finally drawn and filed. The questions involved in the case and the importance of the matter demanded and were given exhaustive examination and attention. I prepared a brief in support of the Governmen's application to intervene and caused the same to be filed. Later, and after the granting of the Government's application to intervene in the case, I made a trip to Oklahoma to confer with Charles B. Selby, Special Assistant to the Attorney General, who had also been assigned to the case by the Attorney General, and while there Mr. Selby and I prepared a brief in the case of R. B. Drake, Chief Probate Attorney for the Five Civilized Tribes, et al. v. W. A. Barnett, County Judge of Okmulgee County, Oklahoma, and E. S. Bailey, wherein the plaintiff sought a writ of prohibition against the county judge and E. S. Bailey to compel them to cease interferring with the funds and property of Jackson Barnett, and in which case the United States appeared resisting the issuance of the writ.

297 The evidence in this case taken by deposition was taken when I was in California, and Mr. Charles B. Selby, Special Assistant to the Attorney General, appeared for the United States in the taking of those depositions.

During the months of May, June, and part of July, 1926, while I was in California, I was requested from time to time by the Department of Justice to furnish authorities and give my advice on various phases of the case as it developed.

Later I appeared at the trial of the case in New York and assisted Mr. Thomas J. Crawford in the presentation of the Government's case and contentions before the court and later assisted Mr. Selby in the preparation of the brief filed on behalf of the Government.

In connection with the preparation and trial of this case and the various proceedings connected with it prior to the trial I read the files of the Department of Justice, documents, and records of the Interior Department introduced in evidence in the case, and the testimony of witnesses in the case taken by deposition, and spent a great deal of time in so doing and in familiarizing myself with the evidence in the case and the questions of law involved.

This affidavit is supplemental to the affidavit of Mr. Charles B. Selby, with whom, throughout my connection with the case, beginning soon after the application and petition of intervention were filed herein, I worked and collaborated, both by correspondence and personal contact. I also co-operated with the attorneys for the next friend, Elmer S. Bailey, so far as the position taken by the
298 Department of Justice agreed with the contentions which they were making, but at all times I insisted that the recovery must be on the intervening petition of the United States to return the funds to the custody and control of the Secretary of the Interior.

I was in California when the amended petition of intervention was prepared and filed and performed no services in connection with its preparation.

NAT M. LACY,
Special Assistant to the Attorney General.

Subscribed and sworn to before me this 15th day of December, 1928.

GRACE MURPHY, *Notary Public.*

My commission expires October 13, 1928.

299 In United States District Court

[Title omitted.]

Affidavit of Charles B. Selby on application for allowances

UNITED STATES OF AMERICA,
District of Columbia, ss:

In re application of Carroll G. Walter et al. for allowance of attorneys' fees

I, Charles B. Selby, being first duly sworn, depose and say:

That since the 24th day of November, 1925, I have acted in the capacity of special assistant to the Attorney General of the United States, under appointment and direction of the Attorney General of the United States, made and entered as of said date; that from said time I have, under direction of the Department of Justice, given special attention to and participated in the above-entitled proceeding in the above-designated court on behalf of the Government of the United States; that also in connection therewith, Hon.
300 Nat M. Lacy, special assistant to the Attorney General, and George P. Barse, formerly departmental attorney, participated in the preparation and conduct of said cause, representing the Government's claim under its bill or petition of intervention filed therein; that said Special Assistant Nat M. Lacy presented the Government's motion to intervene and appeared in court in argument in support thereof, said motion being sustained and leave so

granted the Government about January 29, 1926; that in connection with said Special Assistant Nat M. Lacy I devoted some ten days in preparation of brief in support of said application.

That in April, 1926, said George P. Barse and myself prepared and caused to be filed an amended petition of intervention on behalf of the Government, which pleading now forms a part of the record in this cause and a part of the files of said cause in this court; that in the preparation of said amended petition some two months' time was devoted to an investigation of the law applicable to the case, as well as to the evidence then at hand. That during said period of time and in preparation of the above cause I made an examination of the record testimony taken by the sub-committee of the Committee on Indian Affairs of the House of Representatives, taken in its investigation of Indian affairs, particularly with reference to that part thereof involving the handling of the funds and management of the affairs of Jackson Barnett, whose funds were involved in this cause, as well as also examined innumerable reports of the bureau of investigation of the Department of Justice touching
301 the same subject-matter, as well as records and copies of records involving the same in the Department of the Interior and Department of Justice in the city of Washington, as well as from the office of the Superintendent of the Five Civilized Tribes at Muskogee, Oklahoma, said subject matter of examination covering a period of some five years; these matters all were necessary to be done in order to properly prepare the Government's case both on the facts and the law. The law questions presented were innumerable and more or less novel because of the peculiar situation of the case, with all of which the court is well advised.

In May, 1926, I caused notices to issue for the taking of depositions of witnesses on behalf of the Government in the case, which notices covered largely the same witnesses and provided for the taking of testimony at the same times and places as are set forth and mentioned in the affidavit of Carroll G. Walter, filed in support of said application, to which reference is made for the purpose of brevity; that during substantially all of said period up to October, 1926, I was engaged in analyzing the evidence and in further briefing the law of the case, at which time Jackson Barnett being then in Oklahoma, and the cause being set for trial on the 15th day of October, and desiring the presence of Jackson Barnett before this court in the city of New York, and having determined that under the law the presence of Jackson Barnett could be required before said court, I requested the Department of Justice to direct the district attorney of the Southern District of New York to procure the issuance of proper writ by the court directed to the marshal
302 of the Eastern Federal District of Oklahoma to produce said Jackson Barnett before said court at said trial, which writ having been issued and placed in the hands of the marshal for said Oklahoma District, I procured an order from the District Court of

the United States for the Eastern District of Oklahoma in aid of said New York court writ, commanding said marshal to forthwith cause the said Jackson Barnett to be produced before this court in the city of New York at a time stated, which said writ was duly executed in accordance with the directions thereof; that I thereupon appeared in the Department of Justice in the city of Washington and after further time devoted to preparation for the trial of said cause until about the 25th of October, the date to which said cause was continued, and then went to New York City, where I further conferred with Assistant United States Attorneys Crawford and Sylvester in preparation for the trial of said cause, the same, however, being then continued until about the 15th of November, following. I again, in connection with Special Assistant Nat M. Lacy, appeared in the trial of the cause in New York City, beginning November 16th and continuing to the close of the 24th day of said month; that thereafter, in connection with said Special Assistant Lacy, I devoted some three weeks in the preparation of the brief on behalf of the Government in said cause, consisting of one hundred ninety-nine pages, which was printed, and thereafter filed with his honor, John C. Knox, the judge before whom said cause was tried; on August 9, 1927, Judge Knox rendered an opinion holding
303 the gifts invalid and ordering restoration thereof to the Secretary of the Interior. (See 21 Fed., 2 S., 325, 332.) In February, 1928, defendant mission society served and filed notice of appeal from the judgment of Judge Knox, but the trust company failed to join, and no severance was had, and the Government, as well as the plaintiffs filed their several motions to dismiss the attempted appeal, and in connection therewith I devoted some four or five days in the preparation of authorities and prepared a memorandum thereof and forwarded to the Assistant District Attorney in New York for use under the Government's motion to dismiss said appeal. On May 7, 1928, the Circuit Court of Appeals sustained the motions to dismiss the attempted appeal (see 26 Fed., 2S., 350, 354); that thereafter, and on defendant mission society's petition for writ of certiorari in the Supreme Court of the United States, the Government, through Solicitor General William D. Mitchell, Assistant Attorney General B. M. Parmenter, and Special Assistant E. E. Danley, prepared and filed briefs in opposition to said petition. That throughout the entire case the position of the Government and the position of the plaintiff were substantially the same, except the one difference that the plaintiff sought a surrender of the funds in question to the guardian of the said Jackson Barnett under the laws of the State of Oklahoma, on the theory that the releasing of the funds in question by the Secretary constituted a removal of the restrictions against the same, while the Government's position to the contrary was that the said release of said funds by the Secretary of the Interior was unauthorized as a matter of law, because of the
304 mental incompetency of said Jackson Barnett, and therefore that the same should be surrendered to the Secretary of the

Interior. The depositions and all evidence taken on behalf of the plaintiff and the Government were in effect and by understanding, taken jointly by the plaintiff and by the Government; many of the witnesses, whose depositions were taken at Henryetta and Tulsa, were procured by the plaintiff, while the major part of the documentary evidence offered in the case was procured by the Department of Justice and representatives of the bureau of investigation of that department; that the evidence so taken was submitted on behalf of the plaintiff's petition and of the Government's petition or bill of intervention.

That H. F. Arterberry, special agent of the bureau of investigation, in advance of the taking of the depositions in Oklahoma, devoted some ten days to conferring with the greater part of the witnesses whose depositions were taken; that representatives from the bureau of investigation in Los Angeles in connection with the United States Attorney at Los Angeles, devoted a great amount of time in gathering evidence in California were the Barnetts had gone after Mrs. Barnett received a part of the bonds in question, said investigation including an investigation into the matter of the appointment of the California guardian, and the handling of the funds thereby, coming into the hands thereof, belonging to said Jackson Barnett, as well as investigating and tracing the funds of the said Barnett; that in addition thereto the agents of said bureau in Washington, D. C., devoted a great amount of time in investigating
305 the manner in which the parties conducted the preliminaries of the transaction in question, leading up to the distribution of the bonds in question, as well as conducting investigations in the city of New York, in Kansas City, and in the State of Kansas as to the connection of the involved parties in the matter of the disposition of said bonds, as well as to their acts in carrying out the plan of the alleged wife of Jackson Barnett, and Harold C. McGugin, of Coffeyville, Kansas, as well as devoted a large amount of time to investigating the operations of said parties covering a period of some two years or more in Oklahoma, prior to the making of said pretended gifts; that affiant devoted a large part of his time to an analysis of the reports of the various agents of the bureau, as above mentioned, touching their said investigations of the case and in briefing the law questions involved, while the said G. P. Barse, departmental attorney in the Department of Justice of Washington, during said period of time, largely supervised and directed the investigations in Washington and in New York, and also devoted a large amount of time in connection with affiant in the briefing of the case in New York and in the companion cases thereto in Kansas and in California, and who largely supervised and directed the above activities from the Department of Justice in Washington, and who also devoted a great deal of time during said period in briefing the legal questions that arose from time to time and became involved in said New York pr'cedure and points that were likely to be raised in the

New York trial; that in the preparation of all of the Govern-
306 ment's amended bills in the New York case and the Washing-
ton case, the same were drawn as a result of extended conferences largely between the said G. P. Barse and affiant in harmony with their view of the law and the facts in the case. Affiant further states that he is advised from the records and files in the Department of Justice that Mr. Ira K. Wells, an Assistant Attorney General in the Department of Justice, prior to the middle of the year 1925, devoted a great amount of time also to an investigation of the facts of the case and had prepared briefs thereon, but as to the extent of his activities therein affiant is not able to further state.

The Government's bill in this cause sought a decree of this court adjudging the distribution of the said Jackson Barnett bonds to be unlawful, and to declare the possession thereof by the defendant Equitable Trust Company to be in trust for the use and benefit of Jackson Barnett, and under the control and supervision of the Secretary of the Interior as restricted property, and to decree an accounting thereof, and a return of all of same, together with all benefits therefrom accruing, into the hands of the Secretary of the Interior to be by him held under the law as restricted property for the use and benefit of the said Jackson Barnett, which was accordingly decreed by the court.

Affiant further states that while there was complete harmony of activity between the plaintiff and his solicitors and the Government and its solicitors in the preparation and conduct of the case, yet the Government carried on its prosecution of this case independently
of the plaintiff, on the theory that the acts of the Secretary in
307 releasing said funds and in permitting the distribution thereof did not operate to release the restrictions on said funds, and that the same should not be decreed to pass to the Oklahoma guardian or representative of the said Jackson Barnett, but that same should be returned to the Secretary of the Interior. Affiant states that for the greater part of three years the Department of Justice has been devoting, through one or the other of the representatives thereof, time in working on this cause.

CHARLES B. SELBY,
Special Assistant to the Attorney General of United States.

Subscribed and sworn to before me this 15th day of December, 1928.

[SEAL.] GRACE MURPHY,
Notary Public.

My commission expires Oct. 13th, 1929.

308 In United States District Court

[Title omitted.]

Affidavit of Thomas J. Crawford on application for allowances

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Thomas J. Crawford, being duly sworn, deposes and says:

I am an assistant United States attorney for the Southern District of New York and as such have been in charge of the above-entitled case from the time of the Government's participation therein to date. There have been also associated with me in the prosecution of this case Mr. Alvin Sylvester, and in a minor capacity Mr. Frank Chambers, both assistant United States attorneys for the Southern District of New York.

I have read the affidavits in support of the respective motions for allowances on account of counsel fees and expenses made in behalf of plaintiff's attorneys and through my association with the case am personally familiar with many of the items of service re-
309 ferred to in the affidavit of Carroll G. Walter. I believe the moving affidavits fully and fairly present the services rendered by the various attorneys in the successful conduct of this unusual and difficult litigation. Should the court overrule the contention made by the Government in its response to the petition filed herewith, that the property and money out of which the allowances must be paid are restricted against alienation, the department believes that the court, in determining the amount of the allowances, should be fully advised of the participation by the Government in the prosecution of the suit, and therefore submits the within affidavit and the affidavits of Charles B. Selby and Nat M. Lacy, which briefly outline the activities of the several Government attorneys attached to the Department of Justice in connection with the litigation.

While it is true, as stated in the affidavit of Rayburn L. Foster (pp. 9, 10) that in the earlier suit brought by Anna Laura Barnett, as prochein ami of Jackson Barnett, to ratify and enforce the provisions of the trust, the Government filed an answer for the defendants in that suit, to wit, Hubert Work, Secretary of the Interior, and Charles Burke, Commissioner of Indian Affairs, in which we prayed for the same relief demanded in the bill of complaint, to wit, the ratification of the deed of the gift, subsequently this answer was withdrawn and a motion to dismiss the bill substituted. This procedure was adopted after the Department had concluded to move to intervene in the above suit brought by Elmer S. Bailey, as prochein ami of Jackson Barnett, to set aside the gift and deed of trust as void.

310 Deponent submitted the motion to substitute a motion to dismiss and to withdraw the answer to Judge Winslow on the 5th day of January, 1926, motion being granted. Subsequently, and on February 22, 1926, pursuant to stipulation, an order was signed and filed dismissing the Anna Laura Barnett suit.

Meanwhile, on December 24, 1925, the United States Attorney's office served motion papers for leave to intervene and to file a petition of intervention in the above-entitled suit, said motion being returnable January 5, 1926, the proposed petition of intervention and papers in support of the motion for leave to file having been prepared by the Attorney General's office at Washington.

Deponent argued in support of the motion for leave to intervene on the return day of the motion before Judge Thacher. The motion was vigorously opposed by one of the defendants, the American Baptist Home Mission Society. After argument decision was reserved and deponent subsequently prepared and filed with the court a brief in support of the Government's motion for leave to intervene. As stated in his affidavit, Carroll G. Walter conferred with me in connection therewith, and suggested authorities supporting our application. The motion was granted by Judge Thacher in an opinion handed down January 21, 1926. On February 15, 1926, the defendant, American Baptist Home Mission Society, served its answer to the petition of intervention, and on March 10, 1926, the defendant Equitable Trust Co. of New York filed its answer thereto.

311 Thereafter, at the request of the Attorney General's office, I obtained the consent of the attorneys for the respective parties to the filing of an amended petition of intervention of the United States, which had been prepared by Mr. Charles B. Selby and George P. Barse, of the department. Subsequently testimony of witnesses in behalf of the plaintiff and of the United States was taken by depositions as set forth in the affidavits of Carroll G. Walter and Charles B. Selby.

On September 27, 1926, at the request of the Department, the deponent applied for and obtained a writ of habeas corpus ad testificandum, directed to the United States Marshal at Muskogee, Oklahoma, requiring the presence of Jackson Barnett before the Court on October 15, 1926, which date had been fixed as the trial date by Judge Thacher.

The trial not being reached on the date set, the return date of the writ was extended, upon deponent's request, from time to time, and deponent finally consented to the release of Jackson Barnett from the custody of the marshal upon receiving assurances of the defendant society's counsel in open court that they would produce Jackson Barnett upon the trial of the case.

Deponent also personally and actively participated in the taking of depositions in New York of four witnesses in behalf of the defendant society on October 28 and 29, 1926, said depositions being taken as matter of convenience to out-of-town witnesses of the defendant who were present waiting for the trial to be reached.

The case was finally reached for trial on the 16th day of No-
312 vember, 1926, and continued on the following days, to wit, 16th, 17th, 18th, 19th, 22nd, 23rd, and 24th. Deponent actively participated in the trial of the case in conjunction with his associates,

Alvin Sylvester, assistant U. S. attorney, and Charles B. Selby and Nat M. Lacy, special assistants to the attorney General. At the conclusion of the trial the court reserved decision, whereupon deponent, together with his associate, Mr. Sylvester, and Charles B. Selby, and other representatives of the Department of Justice, collaborated in the preparation and filing of the Government's brief. This brief numbered 199 pages. In connection with the preparation of the Government's brief your deponent's associate, Alvin Sylvester, spent considerable time, including extended conferences with the department's representatives at Washington, D. C.

Judge Knox handed down his opinion, declaring the deed of trust and gift to be invalid and decreeing that the defendants should account and pay over to the Secretary of the Interior the Liberty bonds and proceeds thereof, which was the subject of the gift. In this connection it should be observed that the court sustained the Government's contention in the only point of departure from plaintiff's position in this case, to wit, that the funds should be restored to the Interior Department and not, as prayed for by plaintiff, turned over to the Oklahoma guardian of Jackson Barnett.

Subsequent to the entry of the decree the defendant American Baptist Home Mission Society appealed therefrom to the Circuit Court of Appeals. Thereupon plaintiff, through its attorneys,
313 moved to dismiss the appeal for failure of the appellant American Baptist Home Mission Society to join as a party to the appeal the defendant Equitable Trust Company, trustee under the alleged gift and deed of trust. Your deponent filed a similar motion after collaboration with Mr. Patterson, of the firm of Patterson, Eagle, Grenough & Day, attorneys for the plaintiff. Deponent filed no brief in support of the motion to dismiss the appeal, inasmuch as in his judgment the matter was fully covered by the brief filed in behalf of the plaintiff. Thereafter the Government, through the Solicitor General William D. Mitchell, Assistant Attorney General B. M. Parmenter, and Special Assistant E. E. Danley, filed a brief in opposition to the petition for writ of certiorari filed in the Supreme Court by the American Baptist Home Mission Society to review the decree of the Circuit Court of Appeals dismissing the said appeal, deponent conferring with the attorneys for the plaintiff in regard thereto. The denial of the petition by the Supreme Court terminated the case except as to the application for allowances, the court having kept open the term to permit the filing thereof.

Deponent respectfully states that this affidavit and the affidavits of Mr. Selby and Mr. Lacy are submitted herewith solely for the information of the court and without prejudice to the position taken by the United States of America, intervenor, in its response simultaneously filed herewith that in view of the restriction against the alienation on the funds and property involved in this suit, the court is without jurisdiction to decree payment of any allowances out of said funds and property, as prayed for in the respective

314 petitions, and that such allowances can be made only by the Secretary of the Interior.

THOMAS J. CRAWFORD.

Sworn to before me this 17th day of December, 1928.

[SEAL.] RICHARD L. BALTIMORE,
Notary Public.

New York County No. 33.
New York Co. Register's No.
Commission expires March 30, 1929.

In United States District Court

Defendants' Exhibit 82

CONTRACT

KNOW ALL MEN BY THESE PRESENTS: THAT—

Whereas we, the undersigned, are of kin to and heirs apparent of Jackson Barnett, who is a full-blood Creek Indian, duly enrolled as such opposite roll No. 4524, and who is possessed of a very large estate, and for whom and whose estate Carl J. O'Hornett, of Henryetta, Oklahoma, has been duly appointed by the County Court of Okmulgee County, Oklahoma, as guardian on account of the incompetency of the said Jackson Barnett, and who has qualified and is now acting as such guarding; and

Whereas the said undersigned are informed that the said guardian has been unable to obtain the custody and control of the major
315 portion of the said estate of the said Jackson Barnett, but that without the consent and over the protest of said guardian said estate has been largely depleated and that gifts amounting to at least one million one hundred thousand ($1,100,000.00) follows, have been made therefrom; and

Whereas the said undersigned are informed and believe that such gifts were unlawfully and improperly made and amounted to unjustifiable and inexcusable abstractions from said estate and they are fearful that said estate is in danger of being further depleated, wasted, and lost, and the property and assets belonging thereto kept or taken away from the said Jackson Barnett and his said guardian and those entitled to the same, thereby unjustly and wrongfully depriving and keeping the said undersigned from acquiring and enjoying their proper and rightful inheritance in the event of the death of the said Jackson Barnett.

Now, therefore, we, the said undersigned, have engaged and employed, and do by these presents engage and employ, Cochran & Ellison, of Okmulgee, Oklahoma, as our attorneys to act for and represent us in all matters respecting our interests and rights, both present and future, in and to the said estate of the said Jackson Barnett, and to render all necessary legal services in connection therewith and for the purpose of preserving and conserving said estate, and we do furthermore authorize and empower them to

represent us in all suits and proceedings now pending or which may hereafter be instituted by the said guardian of the said Jackson Barnett or by any other person for him or on his behalf, with
316 the view of protecting and preserving his said estate or any part thereof, and said attorneys are furthermore empowered to continue to represent us in all matters respecting our interests and rights as heirs of the said Jackson Barnett after his death, including the rendering of all necessary or proper legal services in all probate matters, suits, and proceedings which may hereafter arise, affecting such estate as may be left by the said Jackson Barnett at the time of his death, and we furthermore authorize and empower said attorneys to perform any act or acts and to institute such legal proceedings as they may deem to be to the interest of the said undersigned or with the view of preserving the said estate of the said Jackson Barnett, provided the same be not inconsistent with his welfare while living; and in the event of his death said attorneys shall claim, recover, and protect such interest in said estate as the undersigned may respectively be lawfully entitled to receive as heirs.

And the said undersigned have agreed, and do hereby agree, to pay said attorneys for their services in the premises a reasonable fee, same to be not less than thirty per cent nor more than fifty per cent of the value of the property or of such sum or sums of money as they may recover or preserve as the result of their efforts and services; and in any event said attorneys shall be paid such compensation as shall be commensurate with the services performed by them under this contract, even though it might prove to be impossible to compute the same upon the basis above stipulated.

It is understood and agreed, moreover, that C. B. McCrory, the present attorney for the said guardian, is also retained as and for counsel to act and work with said attorneys, Cochran &
317 Ellison in all the matters contemplated and covered by this contract, excepting in such instances, if any may arise during said guardianship, in which the interest of the said undersigned and the interest of the said guardian may actually conflict; and the said McCrory shall receive as his compensation one-half of the fees above provided to be paid.

Witness the following signatures this the 19th day of June, 1923.

DAVID BARNETT.
CHARITY GRAYSON VON BUCHLEY.
JIMMY BARNETT.
NELLIE BARNETT, NOW FOSTER.
MARY BARNETT.
WILLIAM FISHER.
LITTLE (his thumb mark) FISH.
TINY FISH, wee BANNIA.
FRAZIER FISH.

Witness to signatures:
A. B. KEITH.

318 In United States District Court

[Title omitted.]

Replying affidavit of Carroll G. Walker on application for allowances

STATE OF NEW YORK,
County of New York, ss:

Carroll G. Walter, being duly sworn, deposes and says:

I have read the response of the United States to the application for an allowance to plaintiff's counsel herein and the affidavits of Nat M. Lacy, Charles B. Selby, and Thomas J. Crawford and the brief of the solicitors of Department of the Interior, submitted therewith, and make this affidavit in reply thereto.

As appears from the affidavit of Mr. Lacy, and as is more fully set forth in the original affidavits already submitted in support of this application, the intervention of the United States in this cause was brought about through the efforts of the plaintiff's counsel, particularly Mr. Cochran and Mr. Foster.

319 In so far as the intervention of the United States has been of benefit to Jackson Barnett, the services rendered in bringing about that intervention should be taken into consideration in determining the allowance.

At the time the Government decided to intervene there was pending before Judge Thacher a motion for an allowance for expense money, and under date of November 16, 1925, Mr. Lacy wrote my firm as follows:

PATTERSON, EAGLE, GREENOUGH & DAY, Esqs.,
120 Broadway, New York City, N. Y.

In re Barnett v. Equitable—E-31/91

GENTLEMEN: The Department of Justice of the United States has concluded to ask leave to intervene in this suit on behalf of the United States for the purpose of asking that the gift complained of in the bill be set aside to the end that the bonds be recovered for the benefit of Jackson Barnett. It does not, however, desire to make this request formally at this time. I would therefore appreciate it if you would ask the court to withhold decision for twenty days upon the plaintiff's motion for an allowance, which, I understand, is now pending before the court.

The Department of Justice does not wish to oppose the granting of the motion, but because of the relation of this case to other
320 matters it would prefer that no decision be announced in the interval above specified.

Respectfully,

NAT M. LACY,
Special Assistant to the Attorney General.

Subsequent thereto the United States presented its proposed petition of intervention, and in that petition it prayed as follows:

"1. That the defendants, the Equitable Trust Company and the American Baptist Home Mission Society, may be declared to have received and held the United States Liberty loan bonds heretofore described and amounting to the sum of $550,000 par value as the property of Jackson Barnett.

"2. That the defendants, Equitable Trust Company and the American Baptist Home Mission Society be declared to hold said bonds or the proceeds thereof, and all interest and profits received therefrom for the use and benefit of Jackson Barnett, and that said defendants be required to fully account for said bonds and the proceeds thereof, and all interest and profits therefrom, and that after deducting the reasonable expenses incident to this litigation said bonds or the proceeds thereof and the interest and profits thereon be delivered or paid over to the Secretary of the Interior of the United States; that
321 the defendants, Equitable Trust Company and the American Baptist Home Mission Society, be decreed to have no right, title, or interest in and to said bonds or the proceeds thereof, or the interest thereon, and that intervenor have such other and further relief as to the court may seem meet and proper."

The application of the United States for leave to intervene was opposed by the defendant mission society, and I personally prepared and submitted to Assistant United States Attorney Crawford, at his request, a memorandum in which I referred him to the four cases which Judge Thacher afterwards cited in his opinion as sustaining the right of the United States to intervene, and my inference from Mr. Crawford's request and attitude was that he had not previously been furnished with those authorities by the Department of Justice.

After the leave to intervene had been granted there was a further hearing before Judge Thacher upon the application for expense money. The United States did not oppose that application. The mission society, however, then argued that the allowance was then unnecessary because the United States had been permitted to intervene. Despite that argument, the motion was granted, as stated in the original affidavits.

It is therefore submitted that it is now the law of this case that the court has power to grant an allowance.

I do not know how much time and study were given to the prosecution of this case by the several attorneys representing the Government, but I do know that whatever study they bestowed, what-
322 ever information they obtained as a result of their examination of the law and the facts, the assistance which they gave me in the prosecution of the case was practically confined to (a) making available to me the files of the Interior Department with reference to the transaction, (b) aid in securing the presence of Barnett upon the trial, (c) securing the presence of Louis J. Somers,

who came from California and testified as to how Barnett's thumb mark had been obtained upon a will ratifying the gifts here attacked.

No briefs or memoranda upon the law, no names of available witnesses, no statements as to what facts any witnesses would testify to were furnished me by the Government, and no one representing the Government assisted in the preparation of any of the briefs which have been prepared and submitted on behalf of the plaintiff. On the contrary, my associates and myself are the ones who aided the Government by submitting briefs and authorities to its attorneys, and who located and interviewed and examined the several witnesses and prepared the briefs which have been submitted on behalf of the plaintiff.

I do not mean by this to say that there was not cooperation between the attorneys representing the Government and my associates and myself. The presence of the Government was valuable in that the appearance of the suit being one against the Government was thereby avoided, although the gift had been made by an officer of the Government. But the presence of the Government in the case did not in fact lighten our labors. On the contrary, the pres-
823 ence of the Government actually added to our labors and services because of the necessity we were under of consulting, advising, and cooperating with them.

In short, the Government left to my associates and myself the burden of prosecuting the suit, and my understanding of the situation throughout the entire prosecution of the case, derived from what the attorneys for the Government actually did and what they said to me, was that the Government deliberately and consciously intended that the burden should rest upon my associates and myself.

As to who actually conducted the examination of the witnesses I respectfully refer the court to the depositions themselves and to the minutes of the trial. As the court will see therefrom, Mr. Selby in most instances merely adopted on behalf of the Government the examination or cross-examination conducted either by Mr. Foster or myself, and in those few instances in which he did conduct an examination it was almost entirely merely an elaboration of what had been brought out either by Mr. Foster or myself.

In October, 1926, as the case was about to come on for trial, I received from the attorneys acting for the Government very definite intimations that the Secretary of the Interior and Commissioner Burke were pressing the Attorney General for an official opinion upon certain legal questions which were involved in this case and that there was great likelihood that the Attorney General would give to the Secretary of the Interior an official opinion which would be adverse to some of the propositions of law which my associates and myself were urging as of great importance in the determina-
824 tion of this case. The information which I received upon this point was so definite and disturbing that I requested the Attorney General to grant to Mr. Foster and myself an opportunity to

appear before him personally to discuss those questions of law. Mr. Foster and I then went from New York to Washington in company with Mr. Selby and made an argument before Attorney General Sargent and and Solicitor-General Mitchell on October 27, 1926, as stated in my original affidavit upon this application.

While, of course, I can not undertake to state the operations of the minds of the Attorney General and Solicitor General or of the other attorneys engaged in this case on behalf of the Government, I do state as my opinion and conviction, derived from all the facts and surrounding circumstances, that if the Government alone had been in charge of the prosecution of the case the case never would have been tried. Whether I be actually right or wrong in that opinion, the fact is, as above stated, that the presence of the Government in the case instead of lightening our labors actually added to them.

With reference to Mr. Selby's statement that in May, 1926, he caused notices to issue for the taking of depositions on behalf of the Government, I desire to state that the determination as to what witnesses should be examined and the schedule of dates for examination were worked out by Mr. Foster and myself and notices of taking depositions on behalf of the plaintiff were prepared and served by me; and it was after such notices had been given that the Gov-
325 ernment gave similar notices, which were practically copies of the notices I already had prepared and served.

With respect to the issuance of a writ of habeas corpus ad testificandum to secure the presence of Barnett upon the trial, the fact is that at the time it became necessary to obtain such writ Mr. Crawford was actually engaged in other matters connected with his offices which were so pressing that at his request I prepared for him the papers upon which the writ was obtained. Furthermore, to the best of my recollection it was I who suggested that the writ of habeas corpus ad testificandum was the proper process by which to secure the attendance of Barnett and found and submitted to Judge Thacher one or more authorities sustaining that position.

With reference to Mr. Selby's statements as to the dismissal of the appeal which was taken by the mission society, it was the plaintiff, not the Government, which first moved to dismiss the appeal upon the ground that it was invalid because the Equitable Trust Company had failed to join therein. The Government merely followed the plaintiff's motion. When the motion came on for hearing the Government had no brief ready in support of its motion, and the Circuit Court of Appeals required that the briefs be submitted on the day on which the motion was argued, and in consequence thereof the motion was considered and determined upon the plaintiff's brief alone without any brief from the Government. The oral argument in support of the motion was made by myself, the Government merely stating at the conclusion of my argument that it joined therein.

326 With reference to the mission society's petition for a writ of certiorari, I prepared a brief for the plaintiff in opposition thereto and furnished proof sheets thereof to the Government. Thereafter Mr. Crawford submitted to me a draft of brief for the Government, in opposition, which, he said, had been prepared by Mr. Danly, of the Department of Justice, and asked for my suggestions. I examined that draft brief, suggested the elimination of certain authorities which I thought inappropriate, prepared a fuller statement of the facts, and also drafted an additional point in opposition, and submitted all these to Mr. Crawford. The Government's brief as finally printed was in accord with all the suggestions which I made.

CARROLL G. WALTER.

Sworn to before me this 19th day of December, 1928.
[SEAL.] LILLIAN M. JACOB,
Notary Public, Kings County.

Kings Co. clerk's No. 81; reg.'s No. 196.
New York Co. clerk's No. 242; reg.'s No. 0-164.
Commission expires March 30, 1930.

327 In United States District Court

[Title omitted.]

Replying affidavit of Almond D. Cochran on application for allowances

STATE OF NEW YORK,
County of New York, ss:

Almond D. Cochran, being duly sworn, deposes and says: I have read the response of the United States to the application for an allowance to plaintiff's counsel herein, and the affidavits of Nat M. Lacy, Charles B. Selby, and Thomas J. Crawford and the brief of the solicitors of the Department of the Interior, submitted therewith, and make this affidavit in reply thereto.

In the prosecution of this case on behalf of the plaintiff it fell to my lot more particularly than to Mr. Foster and Mr. Walter to keep in touch with the attorneys in the Department of Justice who were working on this case on behalf of the Government.

328 I was with Mr. Selby and Mr. Lacy on many occasions and for long periods of time. Our relations were most friendly and it is with the greatest reluctance that I now make any statements which tend to minimize the value or effect of their services or which may be construed as an attempt to take credit for my associates and myself. In view, however, of the opposition which has been made I feel it is only right and just and in accordance with my duty that I explain, in more detail than has been done in the original affidavits, the nature of the cooperation between the Government and ourselves.

My first task was to induce the Government to come into the case on the side of the plaintiff. The efforts in that regard are set forth in full in the original affidavits.

Although Attorney General Stone reached the conclusion as early as February, 1925, that he thought the gifts entirely unauthorized and that it was the duty of the Government to use its best efforts to assist in recovering the same, the Government did not take any step to recover them and did not make any application to come into this case until November, 1925; and it made that application only after repeated insistence on my part.

After the Government was in the case, in my many conferences with the various attorneys in the Department of Justice it became apparent to me that the Department of Justice and its representatives were being subjected to great pressure from the Department of the Interior, which was seeking by various methods to have the Government either withdraw from the case or take an attitude upholding the gifts. From time to time the Government
329 attorneys raised with me various questions of law and suggested doubts in their minds which it became necessary for me to overcome by argument with them and the production of authorities. Sometimes questions of policy and expediency were raised which tended to delay and impede any action by the Government in behalf of the plaintiff. In brief, after the Government was in the case I performed a vast amount of services in attempting to keep it in the case on the side of the plaintiff.

Throughout the prosecution of the case I was repeatedly told by representatives of the Department of Justice that the burden of prosecuting the case was expected by them to be borne by my associates and myself. On some of these occasions I was reminded that my associates and myself were not hampered by certain limitations which, under the peculiar circumstances of the case, necessarily surrounded the efforts of the Department of Justice, and I was urged to exert the utmost efforts of which my associates and myself were capable. I was also assured that in event of success my associates and I would experience no difficulty in obtaining liberal compensation.

After the trial of the case I personally worked with Mr. Selby in the preparation of the Government's brief. At that time the brief for the plaintiff had been prepared in substantially final form and all material therein had been furnished to Mr. Selby.

The preparation of the Government's brief consumed a great deal of time, but the reason for that, as I know because of my personal participation therein, was that the attorneys engaged in pre-
330 paring it on behalf of the Government were hampered by the withdrawals which had been made upon the trial of certain of the allegations of their amended petition of intervention. Most of the time was devoted to efforts to phrase something which would enable the Government to stay in court at all without violating the

limitations which had been placed upon those engaged in the preparation of the brief.

ALMON D. COCHRAN.

Sworn to before me this 18th day of December, 1928.

LILLIAN M. JACOB,
Notary Public, Kings County.

Kings Co. clerk's No. 81; reg.'s No. 196.
New York Co. clerk's No. 242; Reg.'s No. 0-164.
Commission expires March 30, 1930.

331 In United States District Court

[Title omitted.]

Opinion of Knox, D. J., on application for allowances

Honorable Charles H. Tuttle, United States attorney (Thomas J. Crawford, Esq., of counsel), for Government.

Patterson, Eagle, Greenough & Day, Esqs. (Carroll G. Walter, of counsel); Hummer & Foster, Esqs. (Mr. Foster, of counsel); Cochran & Ellison, Esqs. (Mr. Cochran, of counsel); McCrory & Monk, Esqs. (Mr. McCrory, of counsel), for plaintiff.

Murray, Aldrich & Roberts, Esqs., attorneys for the Equitable Trust Company of New York (Harrison Tweed, of counsel).

Charles S. Fettretch, Esq., attorney for American Baptist Home Mission Society.

E. O. Patterson, Esq., Solicitor, Department of the Interior (O. H. Graves, assistant to Solicitor).

332 KNOX, *D. J.*:

The applications now before me for allowances for counsel fees, expenses, etc., out of the funds of Jackson Barnett which were the subject matter of the litigation in the above-entitled suit, suggest the thought that an Indian, like the wronged women of legend, always pays and pays and pays. And, in this case, precedent will again be followed, as the funds of an incompetent Indian are necessarily diminished through the payment of compensation to persons who put forth successful efforts in the maintenance of rights which should never have been invaded—particularly when they were under the protection of a department of the Government. In this connection, however, it is but fair to note that the sordidness of the story which narrates the facts of the studied attempt that was made to dissipate the wealth of Jackson Barnett is somewhat relieved by the attitude assumed by the Department of Justice when it became aware of what had taken place. When the department went to Barnett's relief it did so right valiantly, and is entitled to credit for what it helped accomplish. But although this be true, the fact is indisputable that the heat and burden of the conflicts which established Barnett's right to claim his own was chiefly borne by Mr. Walter of the

firm of Patterson, Eagle, Greenough & Day; by Mr. Foster, of the firm of Hummer & Foster; by Mr. Cochran, of the firm of Cochran & Ellison; and by Mr. McCrory, of the firm of McCrory and Monk.

Except for the diligence, skill, resourcefullness, and untiring energies of these men, supplemented by the Department of Justice,
333 property belonging to Barnett, and amounting to more than a half million dollars, would have been taken from his estate and devoted to purposes which, however worthy, he was unable to comprehend. But this is not all. Had it not been for what happened here, it might well have come to be an accepted fact that the supposed conservation of the property of Indian wards of the Government might, under certain circumstances, be little more than a mere device by which such property could be effectively and irretrievably dissipated at the behest of whomsoever could succeed in procuring an incompetent Indian to affix his thumb print to a deed of gift.

Even now the Department of the Interior, which is largely, if not wholly, responsible for the attempt that was made to dissipate the money of Barnett, insists that this court is without power to compensate the men who prevented that attempt from becoming an accomplished fact. The record of this case, as made in testimony and as contained in the affidavits filed in support of and in opposition to the pending motion, clearly indicates that the Department of the Interior opposed the effort to recover Barnett's money, and that it is not overly enthusiastic over the outcome of that effort. The court is told, to be sure, that the Government intervened in the suit instituted by Barnett's prochein ami and that it, the sovereign, should be credited with victory. That counsel, appearing on behalf of the United States, rendered worthwhile service is admitted; that they fought earnestly can not be denied; that they assisted in achieving
334 a result favorable to Barnett must be conceded, but any suggestion that the Government initiated the activities which have resulted in the righting of the wrong that was done Barnett, and is deserving of commendation for its alertness in doing so, is without foundation. The Government did not move to undo the acts of the Department of the Interior until after the present applicants had presented the details of the transaction before the Department of Justice, and enlisted its support. Even then, the attorneys for the prochein ami took a leading part in most of the matters that thereafter received attention. These considerations should receive some weight in giving thought to the arguments that are now advanced in opposition to the allowance of fees to the attorney for the prochein ami.

Reverting to the assertion that the court is without power to grant allowances, it is to be remarked that on a previous occasion in the pendency of the suit one of my colleagues authorized a disbursement from the Barnett funds in aid of the preparation for trial. That allowance was not opposed by the United States. So far as a principle of law is involved, the disbursements then authorized had a

basis no more stable than that upon which it is sought to support the present applications.

Furthermore, the order, entered upon my findings and conclusions on the merits of the case, clearly implied that fees and expenses in connection with the suit were expected by counsel, and would be allowed by the court. So far as can be remembered, no objection to such implication was expressed or taken. And certainly, the Government took no appeal from the order. It would appear, therefore, that the question as to the right of the court to make a reasonable allowance had come close to being decided, if it were not already determined.

335

Had the Secretary of the Interior never permitted the fund which forms the subject matter of this suit to get beyond his possession and control, I will agree that the court would be powerless to grant relief to any of the present petitions. The then Secretary, however, saw fit to release the supervision over the disposition of the fund which had been committed to him by Congress. He was not incompetent, as was the case with respect to Barnett, and until the fund is restored to the possession of the Department of the Interior, that department is without license to complain that the reasonable costs and expenses incident to the restoration of the fund to its control are deducted therefrom. The fund is now a res within the control of this court, and justice requires that such res should bear the fees and expenses of its preservation. (Kendall *v.* Ewert, 259 U. S. 139, 149.)

This litigation has extended over a period of four years and, with its ramifications in other courts, has few, if any, parallels in my experience. The tale of the entire episode, as it was unfolded in court, is a matter of record in the books, and he who wishes may read it there. The court is presently concerned with the price of the story. Unfortunately for the integrity of Barnett's fund—and deplorable as this is—but in fairness to the champions of his rights, the price must be high. But not so high as that which is asked. While I appreciate the character of the services rendered in behalf of Barnett, the contingent fee agreement of December 11, 1924, which called for a payment to the attorneys of forty per cent of the amount of the recovery, will not be recognized as binding upon this court. Counsel fees will be fixed in an amount which, in my judgment, seems fair and reasonable. In an endeavor to arrive at that amount I must bear in mind the nature of the fund out of which the fees must come, and the manner by which it came into existence, as well as the danger to which it was subjected. In justice to Barnett, and out of the respect in which the court holds itself, I shall seek to avoid any imputation from a responsible source that Barnett's money was saved from others in order that the judiciary might order its distribution among members of the bar. After full consideration I have decided to allow as fees to the four firms of attorneys heretofore named twenty-five percentum of the value

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of the fund in the hands of the Equitable Trust Company of New York, as of the date of the decree herein, plus $10,000. Such allowance, when received by said attorneys, is to be in full payment of all services rendered herein, and is to be divided among them as they may agree. If they are unable to agree upon such division, the court will apportion the allowance between them. There shall also be paid to said firms in reimbursement of their out of pocket expenses the sum of $4,282.93.

The prochein ami for Barnett may have for his services the sum of seventy-five hundred dollars, with his expenses, not to exceed five hundred dollars, when proof of such disbursements is submitted to the court.

337 The application for an allowance to the attorneys for the defendant trustee is denied. The part played by these attorneys in the drama—and this case is nothing less—was altogether creditable, and was of assistance to the court. Nevertheless, I have, in my opinion, no right to make the allowance they ask.

Last, but by no means least, the services of United States Attorney Crawford should be acknowledged as being of high intelligence, of great help in the solution of the questions involved, and as evidencing the worthy effort of a capable, high-minded, and conscientious public servant. From a material standpoint his recompense will be the paltry sum which the Government pays him in the way of salary, and for which it is too often able to secure services of unusual merit.

December 27, 1928.

JNO. C. KNOX, *U. S. D. J.*

338 In United States District Court

[Title omitted.]

Stipulation as to apportionment of fees

It is hereby stipulated and agreed by and between the undersigned counsel for the plaintiff herein as follows:

1. The allowance made in the opinion of Judge Knox, dated December 27, 1928, for services of the undersigned firms in this case shall be divided into two (2) parts, and the decree to be entered upon said opinion shall provide that one-third of such allowance shall be paid to Patterson, Eagle Greenough & Day, and that two-thirds thereof shall be paid to Hummer & Foster.

2. The compensation of Cochran & Ellison and McCrory & Monk is to be paid by Hummer & Foster out of the shares allowed to them and the decree need not specifically direct any payment to Cochran & Ellison and/or McCrory and Monk.

339 3. The sum of $4,282.93 allowed in said opinion of Judge Knox in reimbursement of out-of-pocket expenses shall be paid

to the firms of Patterson, Eagle, Greenough & Day, Hummer & Foster, and Cochran & Ellison in accordance with the items of expense set forth in the affidavits of Carroll G. Walter, Rayburn L. Foster, and Almond D. Cochran, submitted upon said application.

Dated December 31, 1928.

PATTERSON, EAGLE, GREENOUGH & DAY,
By CARROLL G. WALTER,
A Member of said Firm.

HUMMER & FOSTER,
By RAYBURN L. FOSTER,
A Member of said Firm.

COCHRAN & ELLISON,
By A. D. COCHRAN,
Surviving Partner of said Firm.

McCROBY & MONK,
By DUDLEY C. MONK,
A Member of said Firm.

340 In United States District Court

[Title omitted.]

Affidavit of Alfred Snyder as to value of fund, January 3, 1929

STATE OF NEW YORK, *County of New York, ss:*

Alfred D. Snyder, being duly sworn, deposes and says:

I am an assistant secretary of the Equitable Trust Company of New York and am familiar with the proceedings of said trust company as the trustee named in an agreement dated February 1, 1923, made by the American Baptist Home Mission Society and approved by the Secretary of the Interior of the United States.

The fund in the hands of said trust company, as the trustee named in said agreement, as it existed at the time of the entry of the decree of November 21, 1927, herein, is as set forth in said decree, to which reference is hereby made.

341 Since the entry of said decree the $30,000 par value of United States of America second Liberty loan bonds and the $108,000 par value United States of America Treasury notes, mentioned in said decree, have been paid in full at par and said trust company now holds in lieu thereof the sum of $188,000 in cash.

Since the entry of said decree said fund has earned income amounting to $33,964.91, as is set forth in detail in Schedule A, hereto annexed and hereby made a part of this affidavit.

The total fund now held by said trust company thus now consists of the following, the market values of the bonds having been taken by me from the published quotations appearing in the New York Times of this date:

At the mean of that date—	Market value
$155,000 par value United States of America fourth Liberty loan 4¼'s, due October 15, 1938	$155,532.82
$100,000 par value United States of America first Liberty loan 3½'s, due June 15, 1947	99,875.00
$216,000 par value United States Government 4's, due December 15, 1954	230,310.00
Cash	222,742.18
Total	708,460.00

ALFRED D. SNYDER.

342 Sworn to before me this 3rd day of January, 1929.

MORTIMORE F. HILL,
Notary Public, Westchester County.

Certificate filed, New York County.
Clerk's No. 312, register's No. 0-255.
Commission expires March 30, 1930.

Schedule A to affidavit of A. D. Snyder

Coupons of $155,000 U. S. A. 4th Liberty 4¼'s:		
1928		
April 15	$3,293.75	
Oct. 15	3,293.75	
		$6,587.50
Coupons on $100,000 U. S. A. 1st Liberty 3½'s:		
1927		
Dec. 15	$1,750.00	
1928		
June 15	1,750.00	
Dec. 15	1,750.00	
		5,250.00
Coupons on $80,000 U. S. A. 2nd Liberty 4¼'s:		
1927		
Nov. 15		1,700.00
(These bonds were called at par on that date.)		
343 Coupons on $216,000 U. S. Government 4's:		
1927		
Dec. 15	$4,320.00	
1928		
June 15	4,320.00	
Dec. 15	4,320.00	
		12,960.00
Coupons on $108,000 Treasury notes 4¼'s:		
1927		
Dec. 15		2,430.00
(These notes fell due and were paid on that date.)		
Interest on cash balances:		
To January 1, 1928	$455.09	
To April 1, 1928	991.39	
To July 1, 1928	1,014.63	
To October 1, 1928	1,220.64	
To January 1, 1929	1,355.66	
		5,037.41
		33,964.91

344 In United States District Court

[Title omitted.]

Affidavit of A. F. Schaeffner as to value of fund on November 21, 1927

STATE OF NEW YORK,
County of New York, ss:

Aloysius F. Schaeffner, being duly sworn, deposes and says:

I am an attorney and counsellor at law associated with the firm of Patterson, Eagle, Greenough & Day.

I have ascertained the value of the securities set forth in the decree of November 21, 1927, by examining the published quotations thereof appearing in the Commercial and Financial Chronicle and find that the values thereof on November 21, 1927, were as follows:

345

Security	Value
$155,000 par value United States of America 4th Liberty Loan 4¼'s, due October 15, 1938	$161,200.00
$103,000 par value United States 1st Liberty Loan 3½'s, due June 15, 1947	101,625.00
$80,000 par value United States 2d Liberty loan converted 4¼'s	80,000.00
$216,000 par value United States Government 4's, due December 15, 1954	238,140.00
$108,000 par value United States Treasury notes 4½'s, due December 15, 1927	108,000.00
	688,965.00

$80,000 United States 2d Liberty loan converted 4¼'s were actually redeemed at par on November 15, 1927.

There were no quotations for the $108,000 United States Treasury notes and the same have been listed at par because they were actually paid at par on December 15, 1927.

I have also computed the accrued interest upon the above mentioned securities to November 21, 1927, and find that the amount of such accrued interest on that date was $9,782.07, including $1,700, the amount of the November 15, 1927, coupons upon the $80,000 United States 2d Liberty loan 4¼'s which the account of the Equitable Trust Company herein shows are not include in the decree.

346 The value of the fund mentioned in said decree as of the date of said decree is thus the total of $688,965.00 plus said accrued interest of $9,782.07 and plus the $777.27 in cash mentioned in said decree, making a total of $699,524.34.

Twenty-five per cent (25%) of said total value plus $10,000 is thus $184,881.08.

ALOYSIUS F. SCHAEFFNER.

Sworn to before me this 8th day of January, 1929.

[SEAL.] LILLIAN M. JACOBS,
Notary Public, Kings County.

Kings Co. clerk's No. 81, register's No. 196.
New York Co. clerk's No. 242, register's No. 0–164.

Commission expires March 30, 1930.

347 In United States District Court

[Title omitted.]

Decree on application for allowances

January 8, 1929

Applications for allowances herein having been duly presented to the court, and the court having delivered its opinion thereon dated December 27, 1928, and there having been filed an affidavit by Alfred D. Snyder, assistant secretary of the defendant trust company, verified January 3, 1929, from which it appears that the fund in the hands of said trust company is as follows:

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Security	Market Value.
$155,000 par value United States of America fourth Liberty loan 4¼'s, due October 15, 1938	$155,632.82
$100,000 par value United States of America first Liberty loan 3½'s, due June 15, 1947	99,875.00
$216,000 par value United States Government 4's, due December 15, 1954	230,310.00
Cash	222,742.18
Total	708,460.00

and there having been filed an affidavit by Aloysius F. Schaeffner, verified January 8, 1928, from which it appears that the value of said fund at the date of the decree of November 21, 1927, herein was $699,524.34 and that 25% of such value plus $10,000 is $184,881.08, and there having been filed a stipulation dated December 31, 1928, duly signed by the firms of Patterson, Eagle, Greenough & Day, Hummer & Foster, Cochran & Ellison, and McCrory & Monk, stipulating for an apportionment of their fees between themselves as hereinafter provided;

Now, upon consideration thereof, it is

Ordered, adjudged, and decreed as follows:

1. That the defendant The Equitable Trust Company of New York be and it is hereby ordered and directed to pay, out of
349 the fund hereinabove mentioned, to Hummer & Foster the sum of $123,254.05 in full payment of all services rendered by the firms of Hummer & Foster, Cochran & Ellison, and McCrory & Monk in this cause, and the further sum of $1,168.53 in reimbursement of the out-of-pocket expenses of said firm of Hummer & Foster herein.

2. That the defendant The Equitable Trust Company of New York be and it is hereby ordered and directed to pay, out of the fund hereinabove mentioned, to Patterson, Eagle, Greenough & Day the sum of $61,627.03 in full payment of all services rendered by said firm of Patterson, Eagle, Greenough & Day herein, and the further sum of $1,849.40 in reimbursement of the out-of-pocket expenses of said firm of Patterson, Eagle, Greenough & Day herein.

3. That the defendant The Equitable Trust Company of New York be and it is hereby ordered and directed to pay, out of the fund hereinabove mentioned, to Cochran & Ellison the sum of $1,265 in reimbursement of the out-of-pocket expenses of said firm of Cochran & Ellison herein.

4. That the defendant The Equitable Trust Company of New York be and it is hereby ordered and directed to pay, out of the fund hereinabove mentioned, to Elmer S. Bailey the sum of $7,500 in full payment of his services as prochein ami herein.

5. That the defendant The Equitable Trust Company of New York be and it is hereby ordered and directed, after making
350 the payments hereinabove specified, to pay, transfer, and deliver to the Secretary of the Interior of the United States, to be held by him as property of Jackson Barnett under and pursuant to the acts of Congress relating thereto, the entire remaining balance of the fund hereinbefore mentioned, to wit.

Security	Value
$155,000 par value United States of America fourth Liberty loan 4¼'s, due October 15, 1938	$155,532.82
$100,000 par value United States of America first Liberty loan 3½s, due June 15, 1947	96,875.00
$216,000 par value United States Government 4's, due December 15, 1954	230,310.00
Cash	26,078.01
Total	511,795.83

6. That the application of Murray, Aldrich & Roberts for an allowance out of the fund hereinabove mentioned for their services and disbursements as solicitors for the defendant trust company herein be and the same is hereby denied.

7. That upon making the payments, transfers, and deliveries hereinabove directed the defendant The Equitable Trust Company of New York shall be discharged from all duty, responsibility, accountability, and liability under the agreement executed by the American
Baptist Home Mission Society to the Equitable Trust Com-
351 pany of New York, dated February 1, 1923, and with respect to the property received by it thereunder and the income and proceeds thereof.

JNO. C. KNOX, *U. S. D. J.*

Notice of settlement waived.

MURRAY, ALDRICH & ROBERTS,
Solicitors for the Equitable Trust Company of New York.
CHARLES H. TUTTLE,
United States Attorney,
Solicitor for United States of America.

352 In United States District Court

[Title omitted.]

Petition and allowance of appeal

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

Now comes the United States of America, intervenor herein, by its attorney, Charles H. Tuttle, United States attorney for the Southern District of New York, and feeling itself aggrieved by the decree entered herein on the 8th day of January, 1929, by which it was adjudged that the defendant The Equitable Trust Company of New York pay out of the funds of Jackson Barnett, a mental incompetent and full-blood restricted Indian of the Five Civilized Tribes, certain allowances aggregating $184,881.08 by way of counsel fees and disbursements in the sum of $3,017.93 to attorneys and
353 counsel employed by Elmer S. Bailey, as prochein ami, and an allowance of $7,500.00 to the prochein ami for his services, all with respect to the prosecution of the above-entitled suit, states that in the said decree and the proceedings had in connection with the entry thereof certain errors were committed to the prejudice of the intervenor, the United States of America, all of which more fully appears in the assignment of errors filed herewith.

Wherefore the United States of America, the intervenor herein, prays that an appeal may be allowed to it from the United States Circuit Court of Appeals for the correction of the errors so complained of and that the transcript of record, proceedings, and papers involved in this appeal, duly authenticated, may be sent to the said Circuit Court of Appeals.

Dated, New York, January 22, 1929.

CHARLES H. TUTTLE,
United States Attorney for the Southern District of New York, Attorney for United States of America, Intervenor.

Appeal as prayed for is hereby allowed.

Dated, New York, January 22, 1929.

JNO. C. KNOX, *U. S. D. J.*

354 In United States District Court

[Title omitted.]

Assignment of errors

Now comes the United States of America, intervenor, by its attorney, Charles H. Tuttle, United States attorney for the Southern District of New York, and files the following assignment of errors upon which it will rely in the prosecution of its appeal from the decree of this court entered herein on the 8th day of January, 1929,

First. The court erred in holding and deciding that it had such jurisdiction over the funds and property in the possession of the defendant The Equitable Trust Company of New York belonging to Jackson Barnett, a full-blood Creek Indian and member of the Five Civilized Tribes of Oklahoma and ward of the United States of America, intervenor herein, as to authorize the court to make the allowances which by its said order of January 8, 1929, it
355 directed the defendant The Equitable Trust Company of New York to pay out of the funds and property in its possession, as aforesaid, to wit, to Messrs. Patterson, Eagle, Greenough & Day, to Messrs. Hummer & Foster, to Messrs. Cochran & Ellison, and to Messrs. McCrory & Monk, allowances for counsel fee for services rendered herein the sums aggregating $184,881.08, and the sum of $3,017.93 on account of disbursements, and to Elmer S. Bailey on account of his services as prochein ami herein the sum of $7,500.00.

Second. The court erred in directing the payment by the defendant The Equitable Trust Company of New York, out of the funds and property in its possession belonging to the said Jackson Barnett, of the allowances hereinabove mentioned for services rendered and disbursements incurred without the approval of the Secretary of the Interior of the United States of America.

Third. The court erred in refusing to hold that the funds and property in the possession of the said defendant The Equitable Trust Comapny of New York constituted restricted funds of Jackson Barnett, a full-blood Creek Indian of the Five Civilized Tribes and ward of the United States of America, intervenor herein, and in refusing to hold that the court was without jurisdiction, therefore, under the law, to direct the payment of any allowances on account of counsel fees and expenses incurred in connection with the prosecution of the suit herein without the consent and approval of the Secretary of the Interior of the United States of America.

Fourth. The court erred in refusing to hold that the United
356 States of America, intervenor herein, through its Secretary of the Interior, is entitled to the return and to the custody of the said property and funds of the said Jackson Barnett, undiminished by the payment of any allowances by way of counsel fees and/or disbursements.

Fifth. In any event, allowances fixed by the court and directed by the aforesaid decree to be paid to Messrs. Patterson, Eagle, Greenough & Day, to Messrs. Hummer & Foster, to Messrs. Cochran & Ellison, and to Messrs. McCrory & Monk, aggregating the sum of $184,881.08, and the allowance of $7,500.00 to the prochein ami were excessive in amount and beyond fair and reasonable compensation for the services rendered herein.

Wherefore the United States of America, intervenor herein, prays that the said decree of the District Court of the United States for the Southern District of New York in so far as it directs the payment of the aforesaid allowances and disbursements may be reversed and, in order that the foregoing assignment of errors may

be a part of the record, the United States of America, intervenor herein, presents the same to the court and prays that such disposition may be made thereof as is in accordance with law and the statutes of the United States in such matter made and provided. All of which is respectfully submitted.

Dated, New York, January 22, 1929.

CHARLES H. TUTTLE,
United States Attorney for the Southern District of New York, Attorney for the United States of America, Intervenor.

357–358 [Citation in usual form omitted in printing.]

359 In United States District Court

[Title omitted.]

Stipulation as to record on appeal

It is hereby stipulated and agreed that the record on appeal herein shall consist of the following, to wit:

360 1. Statement under rule 13, subdivision 4.
2. Amended bill of complaint.
3. Answer of Equitable Trust Company.
4. Answer of American Baptist Home Mission Society.
5. Motion of United States for leave to intervene.
6. Petition of intervention of United States.
7. Opinion of Thacher, D. J., on motion of United States for leave to intervene.
8. Answer of Equitable Trust Company to petition of intervention.
9. Answer of American Baptist Home Mission Society to petition of intervention.
10. Order granting application for expense money.
11. Order permitting amended petition of intervention by United States.
12. Amended petition of intervention of United States.
12a. Statement at trial withdrawing certain allegations.
13. Opinion of Knox, D. J., on final hearing.
14. Final decree of November 21, 1927.
15. Order of March 7, 1928, as to applications for allowances.
16. Order of March 28, 1928, as to applications for allowances.

361 17. Order of May 25, 1928, as to applications for allowances.
18. Notice of motion for allowance to prochein ami.
19. Notice of motion for allowance to plaintiff's counsel.
20. Affidavit of Carroll G. Walter in support of application for allowances.
21. Affidavit of Rayburn L. Foster in support of application for allowances.

22. Affidavit of Almond D. Cochran in support of application for allowances.
23. Response of United States to application for allowances.
24. Affidavit of Nat M. Lacey on application for allowances.
25. Affidavit of Charles B. Selby on application for allowances.
26. Affidavit of Thomas J. Crawford on application for allowances.
26a. Defendants' Exhibit 82.
27. Replying affidavit of Carroll G. Walter on application for allowances.
28. Replying affidavit of Almond D. Cochran on application for allowances.
29. Opinion of Knox, D. J., on application for allowances.
30. Stipulation as to apportionment of fees.
362 31. Affidavit of Alfred D. Snyder as to value of fund on hand January 3, 1929.
32. Affidavit of Aloysius F. Schaeffner as to value of fund on November 21, 1927.
33. Decree of January 8, 1929, on application for allowances.
34. Petition for and allowance of appeal of United States.
35. Assignment of errors.
36. Citation.

And in addition to the foregoing all depositions, testimony, exhibits, briefs, and other papers submitted to and filed in the District Court in the above-entitled matter not included in the matters hereinbefore specifically enumerated.

Dated, New York, February 19, 1929.

CHARLES H. TUTTLE,
United States Attorney, Solicitor for Appellant.
MURRAY, ALDRICH & ROBERTS,
Solicitors for the Equitable Trust Company of New York and Murray, Aldrich & Roberts.
PATTERSON, EAGLE, GREENOUGH & DAY,
Solicitors for All Other Appellees.

363 In the United States Circuit Court of Appeals

[Title omitted.]

Order as to printing

Upon the annexed consents and upon motion of Charles H.
364 Tuttle, United States attorney for the Southern District of New York, attorney for the United Sattes of America, intervenor-appellant, it is

Ordered that the following papers only of the record on appeal herein shall be printed and included in the transcript of record on appeal, to wit:

1. Statement under rule 13, subdivision 4.

2. Amended bill of complaint.
3. Answer of Equitable Trust Company.
4. Answer of American Baptist Home Mission Society.
5. Motion of United States for leave to intervene.
6. Petition for intervention of United States.
7. Opinion of Thacher, D. J., on motion of United States for leave to intervene.
8. Answer of Equitable Trust Company to petition of intervention.
9. Answer of American Baptist Home Mission Society to petition of intervention.
10. Order granting application for expense money.
11. Order permitting amended petition of intervention by United States.
12. Amended petition of intervention of United States.
12a. Statement at trial withdrawing certain allegations.
365 13. Opinion of Knox, D. J., on final hearing.
14. Final decree of November 21, 1927.
15. Order of March 7, 1928, as to applications for allowances.
16. Order of March 28, 1928, as to applications for allowances.
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20. Affidavit of Carroll G. Walter in support of application for allowances.
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22. Affidavit of Almond D. Cochran in support of application for allowances.
23. Response of United States to application for allowances.
24. Affidavit of Nat. M. Lacey on application for allowances.
25. Affidavit of Charles B. Selby on application for allowances.
26. Affidavit of Thomas J. Crawford on application for allowances.
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366 27. Replying affidavit of Carroll G. Walter on application for allowances.
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29. Opinion of Knox, D. J., on application for allowances.
30. Stipulation as to apportionment of fees.
31. Affidavit of Alfred D. Snyder as to value of fund on hand January 3, 1929.
32. Affidavit of Aloysius F. Schaeffner as to value of fund on November 21, 1927.
33. Decree of January 8, 1929, on application for allowances.
34. Petition for and allowance of appeal of United States.
35. Assignment of errors.
36. Citation.

37. Stipulation as to contents of record on appeal dated February 20, 1929.

And it is further ordered that all depositions, testimony, exhibits, briefs, and all other papers included by the stipulation of the parties to this appeal filed in the United States District Court on the 20th day of February, 1929, as constituting the record of appeal, may be omitted from and not printed in the transcript of record on appeal but may be referred to and submitted to the court upon the argument
of the appeal by any of the parties to the appeal with the same
367 force and effect as though the same were printed and included in the transcript of record herein.

Dated, New York, February 20th, 1929.

MANTON,
United States Circuit Judge.

The entry of the foregoing order is hereby consented to.
Dated, New York, February 19, 1929.

CHARLES H. TUTTLE,
United States Attorney, Solicitor for Appellant.
MURRAY, ALDRICH & ROBERTS,
Solicitors for the Equitable Trust Company of New York and Murray, Aldrich & Roberts.
PATTERSON, EAGLE, GREENOUGH & DAY,
Solicitors for All Other Appellees.

368 In United States District Court

[Title omitted.]

Stipulation on appeal record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

369 Dated March 8th, 1929.

CHARLES H. TUTTLE,
United States Attorney,
Attorney for United States, Appellant.
MURRAY, ALDRICH & ROBERTS,
Attorneys for the Equitable Trust Co. of New York and Murray, Aldridge & Roberts, Appellees.
PATTERSON, EAGLE, GREENOUGH & DAY,
Attorneys for All Other Appellees.

370–371 [Clerk's certificate to foregoing transcript omitted in printing.]

372 In United States Circuit Court of Appeals for the Second Circuit

No. 331—October term, 1928

Argued May 17, 1929. Decided July 15, 1929

JACKSON BARNETT, A MENTAL INCOMPETENT, BY Elmer S. Bailey, His Procheim Ami, plaintiff

v.

EQUITABLE TRUST COMPANY OF NEW YORK AND the American Baptist Home Mission Society, defendants

UNITED STATES OF AMERICA, INTERVENER

EQUITABLE TRUST COMPANY OF NEW YORK; Murray; Aldrich & Roberts; Edward J. Patterson, J. Frederick Eagle, Wm. Greenough, Sherman Day, Carroll G. Walter, and Dodge L. Marks, Composing the Firm of Patterson, Eagle, Greenough & Day; Rayburn L. Foster and R. B. F. Hummer, Composing the Firm of Hummer & Foster; Almond D. Cochran, Surviving Partner of the Firm of Cochran & Ellison; C. B. McCrory and Dudley C. Monk, Copartners Composing the Firm of McCrory & Monk; and Elmer S. Bailey, Individually and as Procheim Ami of Jackson Barnett, appellees

v.

UNITED STATES OF AMERICA, APPELLANT

Appeal from the District Court of the United States for the Southern District of New York

Before L. Hand, Swan, and Augustus N. Hand, Circuit Judges

Opinion

Appeal by the United States from a decree of the District Court for the Southern District of New York making allowances to the attorneys for, and prochein ami of, the plaintiff in a suit in equity.

On January 22, 1925, one Jackson Barnett, a full-blooded Creek Indian, filed his bill in the District Court for the Southern District of New York against the Equitable Trust Company of New York and the American Baptist Home Mission Society, in which he alleged in substance: That he was an incompetent person, 75 years of
373 age, and the owner of a quarter section of land in Oklahoma on which oil had been found. This land he had leased in due form of law, and had received very large royalties from it, which had accumulated in the hands of the Secretary of the Interior. That the mission society, in conjunction with others, had practiced upon

his incompetence and secured the consent of the Secretary of the Interior to his gift to it of $550,000, out of which he was to have while he lived a yearly income of $20,000, the remainder going with the principal. These funds the mission had deposited with the defendant trust company, and the suit was to compel it to turn them back to Barnett.

Being an incompetent and so alleging, Barnett sued by one Bailey as his prochein ami, who was at that time acting as the guardian of his property under appointment of the Oklahoma County Court. The Secretary of the Interior declined to join in pressing the suit, but eventually, after much effort by Barnett's attorneys and in the face of opposition from the Secretary, the Attorney General was persuaded to apply for intervention on behalf of the United States, and this was eventually allowed, over the objection of the defendants, on January 29, 1926.

Meanwhile the defendants' attorneys, who were also attorneys for Barnett's wife, to whom he had made an equal gift which he was trying to set aside in a separate suit, began three proceedings in his name against Bailey in Oklahoma. One of these was a suit in equity in the United States District Court for the Eastern District of Oklahoma to enjoin him from asserting any control over Barnett's estate. The second was in the County Court of Oklahoma to revoke his letters of guardianship, Bailey having theretofore made a contingent agreement with Barnett's attorneys that they should prosecute the litigation for 40 per cent of the recovery. The third was for a writ of prohibition out of the Supreme Court of Oklahoma, to prevent the county judge and Bailey from interfering with any funds in Barnett's hands or those here in suit. Barnett was represented in these proceedings by another prochein ami, and they were very extensively litigated. The net result of all was that Bailey's letters were vacated upon a technical ground, the writ was refused, and the suit in equity was dismissed. The services in these proceedings were included among those for which allowance was asked.

In the preparation for trial of this suit it was necessary to take the depositions of many witnesses in Oklahoma, and it was thought desirable to have Barnett present in the custody of a marshal. All this entailed much traveling and time, as did the preparation of the cause upon the law. The attorneys likewise unsuccessfully beset the Secretary of the Interior with applications for an allowance out of Barnett's funds for the prosecution, and spent much energy in securing the intervention of the United States. This, too, involved much traveling and time. The cause came on for trial in November, 1926, and consumed seven days; it was decided in favor of Barnett a year later, the decree directing the defendant trust company to restore the funds—which then amounted to nearly $700,000—to the Secretary of the Interior, subject to such allowances as the court might make. The mission society appealed to this court, but the appeal was dismissed, and a petition for certiorari was denied.

Thereafter the court, upon petition for allowance, awarded the attorneys for Barnett 25 per cent of the amount of the fund, together with $10,000, about $184,000 in all, and their expenses, and to Bailey, as prochein ami, $7,500. The United States as intervener opposed these allowances; it alleged that the funds remained restricted property, though in the hands of the defendant trust company, and that only the Secretary had power to make any allowance whatever. If not, it maintained that in any event the allowances were too large, since the proceedings in Oklahoma did not concern the suit at bar, and that after the intervention of the United States in November, 1925, it, not Bailey, was the representative of Barnett, and that the appellees had no claim for anything done thereafter.

Nat M. Lacy, of Washington, D. C. (O. H. Graves, of Washington, D. C., on the brief), for appellant.

Carroll G. Walter, of New York City, for appellees.

L. HAND, Circuit Judge (after stating the facts as above): We hold that the District Court had power to make an allowance out of the fund. Whatever the status before May 27, 1908, of the lands of allottees of the Five Civilized Tribes, of whom the Creeks are one, the act of that day (35 Stat. 312), established their position from
374 that time on. They were not to be conveyed before April 26, 1931, "except that the Secretary of the Interior may remove restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe." The property remained the Indian's, but he was restrained in its alienation, except as the Secretary might allow; when the Secretary concurred, he was free, like another owner, to transfer his rights. This applied as well to the proceeds of his land, in this instance to the royalties arising from a lawful lease, as to the realty itself. When, therefore, Barnett, with the Secretary's consent, gave the securities to the mission the funds passed to its hands unrestricted and as free funds.

Only a court could undo the transaction so taking place. This is plain, if Barnett knew enough of what he was about to intend the transfer. In that case title passed, and a court of equity must declare it void. If, as the twentieth article of the bill seems to allege, he did not so intend, at least possession passed, and the Secretary could not recall it by virtue of his office; either Barnett or the United States must sue to get it. What either got might have to come back to the Secretary's custody, but his powers would revive only then, and to only so much as in fact did. We can, therefore, see no reason to say that the court's wings were clipped by restrictions which the Secretary had lawfully, if improvidently, removed, or that it need, or indeed should, have shared its jurisdiction with him. It could, for instance, scarcely be argued that, had the res been meanwhile cared for by a third person, he could not intervene in the suit in his own behalf and secure a determination of his claim, or that he must present it to the Secretary and abide his decision. Congress might

perhaps have vested him with such power, but it did not. The res was at large; courts alone could direct its distribution. The situation, therefore, is no different from that often before a court, in which it is necessary to sacrifice part of a property to preserve or regain the rest. The District Court, not being able to decide without evidence and assistance as to the law, properly restored only so much as remained after those services were paid which had enabled it to act. (Kendall v. Ewert, 259 U. S. 139, 149, 42 S. Ct. 444, 66 L. Ed. 862.) The stake was the remainder, to which alone the restrictions of the statute can apply. The only question is of the proper amount.

Barnett might have sued alone, as he did (Tiger v. Western Investment Co., 221 U. S. 286, 31 S. Ct. 578, 55 L. Ed. 738), or the United States might have sued for him (Heckman v. U. S., 224 U. S. 413, 32 S. Ct. 424, 56 L. Ed. 820). The choice lay with the Attorney General. He did sue alone, and certainly until he procured the intervention of the United States his attorneys might claim for their services as in any other case. In January, 1926, this changed, for the United States then intervened as a party plaintiff, unlike Bailey, who was not a party at all. The Attorney General might, indeed, have imposed it as a condition that Barnett should retire, which would have left the United States in complete charge. He did not, probably for the reason that Barnett's attorneys had already gone so far; but we see no reason why there should not have been two plaintiffs, and why each should not be represented. But, if so, the appellees should not be deprived of fees which they earned under their separate retainer. They had received no intimation that their services were for the United States, which had it been made, would certainly have provoked a definite understanding. Each plaintiff proceeded in its own behalf, and, while the appellees must in theory abate their claim for any services in fact made unnecessary by their intervention, there need be no such deduction, for they did substantially all that was done. It is too late now, after the heat of the day, to suggest that their client had been changed sub silentio.

However, we can not agree that the Oklahoma litigation was part of this suit or that those services should be paid for here. True, Barnett was an incompetent person, and as such the court would not leave him to his own devices, which were so meager. Bailey appeared as his prochein ami, and the court was satisfied to let him continue. It need not have done so; at any time it might have displaced him and substituted some one else. (King v. McLean, etc., Hospital (C. C. A. 1), 64 F. 331, 354, 355, 26 L. R. A. 784; Street, § 459.) Hence it was a matter of no moment to this suit what took place thereafter in Oklahoma. Bailey got no authority over the assets in New York by his letters in Oklahoma. (Hoyt v. Sprague, 103 U. S. 613, 631, 26 L. Ed. 585; Morgan v. Potter, 157 U. S. 195, 15 S. Ct. 590, 39 L. Ed. 670; Lamar v. Micou, 112 U. S. 452, 470, 5 S. Ct. 221, 28 L. Ed. 751; Morrell v. Dickey, 1 Johns. Ch. (N. Y.) 153; Kraft v. Wickey, 4 Gill & J. (Md.) 332, 23 Am. Dec. 569; Grimmett v. Witherington, 16 Ark.

377, 63 Am. Dec. 66.) Indeed, these were revoked, without effect upon this prosecution. He might have been enjoined, or prohibited, or otherwise prevented from taking action; it would have accomplished nothing. Barnett, and Barnett alone, was the plaintiff; the assets were here, and the District Court would and should have protected him by securing a proper substitute. After the intervention of the United States, this might, indeed, have been unnecessary, though in view of its relative inaction it would still have been wise.

So we cannot see how the appellees can be allowed anything for those services, and in so far as they entered into the allowance the mistake was one of law. The appellees argue that it was a reasonable precaution to contest these proceedings, whether necessary or no; but we cannot agree. We do not think that it was a precaution; to us the litigation seems plainly irrelevant. The appellees, being learned in the law, if not chareable with such a mistake, at least cannot make it a part of their claim here, for in fact they did not in this activity assist the prosecution at all. Besides, it is doubtful whether there was a mistake, for there was quite another reason why they have thought it important to keep Bailey a guardian. They had a contract with him for 40 per cent of the recovery, which they believed, perhaps rightly, was valid, and which depended upon his continued authority.

However, even after these services are excluded, there undoubtedly remained a large amount of labor necessarily involved in the prosecution. Barnett, who had the mentality of a child, could not help; he had been surrounded by those who meant only to fleece him; they would not help. The Department of the Interior would take no action, apparently believing that the money was better employed as it was than Barnett or his heirs could employ it. The evidence had to be drawn from unwilling sources, and the right was not altogether clear. Barnett, as a restricted Indian, was not legally competent to convey, however competent he might personally be judged by ordinary standards. Congress had put him under the tutelage of the Secretary; merely by virtue of his status, though, if the Secretary approved, this was removed. Doubtless the Secretary's approval, standing alone, was not a conveyance; we may also assume that a conveyance, defective even in its factum, would be the equivalent of none. But it was not clear that Barrett did not actually mean to convey, and, if he did, his gift was not void, but must be set aside because of his personal incapacity. It was possible that a court might hold that, being in any case non sui juris, his personal incapacity was a part of his status, and that once the Secretary had approved, acting upon the facts of his case, the gift was valid. We think that the hazard was substantial.

The allowance depends in part upon the amount at stake. Between February 1, 192–, when the gift was made, and November 21, 1927, when the decree was entered, the income falling due under the bonds was less than $140,000, though by how much we do not know, as the market value of the bonds was in some instances above par.

Of this Barnett during this period was entitled to about $96,000, regardless of the result, and the total amount involved was therefore substantially less than $600,000. If there be a rule in the District Court that in such cases allowances shall be made upon a basis of one-third of the amount involved, we do not know it and we disapprove it; it certainly has never had our sanction. We do not mean, of course, that a percentage basis is in itself improper; but it cannot be fixed at the same rate for all cases regardless of the amount. The allowance is a payment for legal services, not a speculative interest in a lawsuit. It does not appear whether the district judge included the Oklahoma litigation with the rest, though we should have expected him to say that he did not, if that were so. Whether he did or not, we think the allowance plainly too large.

It is argued that we should not disturb it, unless there has been an abuse of discretion. Perhaps so, but that phrase means no more than that we will not intervene, so long as we think that the amount is within permissible limits; if our conviction is definite that it is, we cannot properly abdicate our judgment. Had the result been certain, we should have thought $50,000 enough for the work involved, excluding the Oklahoma litigation. As the hazard was real, for the reasons we have given, we think that $100,000 might be allowed, but that appears to us the utmost that could be. It is idle to go into details; such matters are proverbially uncertain, and men will undoubtedly differ about them; but we think it of much importance that in cases of the kind the inducement shall be kept within limits.

376

The allowance to Bailey we will not disturb.

Award reduced to $100,000 and expenses; decree otherwise affirmed.

377 In United States Circuit Court of Appeals, Second Circuit

JACKSON BARNETT, PLAINTIFF

v.

EQUITABLE TRUST COMPANY OF NEW YORK ET AL., DEFENDANTS

UNITED STATES, APPELLANT

Decree

Filed July 22, 1929

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is modified in accordance with the opinion of this court and as so modified is affirmed.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

WM. PARKIN, *Clerk.*

378 [File indorsement omitted.]

379–388 [Petition for rehearing, covering 10 pages, filed Aug. 12, 1929, omitted from this print. It was denied, and nothing more, by order Sept. 18, 1929.]

389 In United States Circuit Court of Appeals, Second Circuit

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court rooms in the post-office building, in the city of New York, on the 18th day of September, one thousand nine hundred and twenty-nine.

[Title omitted.]

Order denying rehearing

Filed Sept. 19, 1929

A petition for a rehearing having been filed herein by counsel for the appellees,

Upon consideration thereof it is

Ordered that said petition be and hereby is denied.

WM. PARKIN, *Clerk.*

390 [File endorsement omitted.]

391 [Clerk's certificate to foregoing transcript omitted in printing.]

392 Supreme Court of the United States

Order allowing certiorari

Filed January 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of

the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 34,661. U. S. Circuit Court of Appeals, Second Circuit. Term No. 530. The United States of America, petitioner, vs. The Equitable Trust Company of New York, Murray, Aldrich & Roberts, Edward J. Patterson, et al. Petition for writ of certiorari and exhibit thereto. Filed December 18, 1929. File No. 34,661.

U. S. GOVERNMENT PRINTING OFFICE

FILE COPY

Supreme Court
FILED
DEC 18 192
CHARLES ELMORE CR
CL

No. 21

In the Supreme Court of the United States

OCTOBER TERM, 1929

UNITED STATES OF AMERICA, PETITIONER

v.

THE EQUITABLE TRUST COMPANY OF NEW YORK; MURRAY, ALDRICH & ROBERTS; EDWARD J. PATTERSON; J. FREDERICK EAGLE; WILLIAM GREENOUGH; SHERMAN DAY; CARROLL G. WALTER AND DODGE L. MARKS, COMPOSING THE FIRM OF PATTERSON, EAGLE, GREENOUGH AND DAY; RAYBURN L. FOSTER AND R. B. F. HUMMER, COMPOSING THE FIRM OF HUMMER & FOSTER; ALMOND D. COCHRAN, SURVIVING PARTNER OF THE FIRM OF COCHRAN & ELLISON; C. B. MCCROBY AND DUDLEY C. MONK, COPARTNERS COMPOSING THE FIRM OF MCCROBY & MONK; AND ELMER S. BAILEY, INDIVIDUALLY AND AS PROCHEIN AMI OF JACKSON BARNETT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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THE EQUITABLE TRUST COMPANY OF NEW YORK; Murray, Aldrich & Roberts; Edward J. Patterson; J. Frederick Eagle; William Greenough; Sherman Day; Carroll G. Walter and Dodge L. Marks, composing the firm of Patterson, Eagle, Greenough and Day; Rayburn L. Foster and R. B. F. Hummer, composing the firm of Hummer & Foster; Almond D. Cochran, surviving partner of the firm of Cochran & Ellison; C. B. McCrory and Dudley C. Monk, copartners composing the firm of McCrory & Monk; and Elmer S. Bailey, individually and as *prochein ami* of Jackson Barnett.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

PETITION

The Solicitor General on behalf of the United States of America prays that a writ of certiorari issue to review a judgment of the United States

Circuit Court of Appeals for the Second Circuit entered in the case of Jackson Barnett, a mental incompetent, by Elmer S. Bailey, his *prochein ami*, plaintiff, *v.* The Equitable Trust Company of New York and The American Baptist Home Mission Society, defendants, United States of America, intervener, on September 18, 1929 (R. 377, 384), reducing but otherwise affirming, an award made by decree of the United States District Court for the Southern District of New York (R. 347) to certain of the respondents out of the restricted property of Jackson Barnett, a full-blood Creek Indian, for their services and disbursements as attorneys and *prochein ami*, respectively, in that case.

QUESTION PRESENTED

The question presented is:

Whether in view of the final decision and decree of the District Court in the original case that the attempted gift, transfer, and assignment of the restricted funds to the defendants therein was null and void, the courts below had any power to charge the restricted property with allowances for attorneys' fees, services, and disbursements. The Government also contends that the allowances were excessive in amount.

STATEMENT

Jackson Barnett, a full-blood Creek Indian, now seventy-eight years of age, is possessed of land allotted to him by the Government from the tribal lands of the Creek or Muskogee Nation, one of the

Five Civilized Tribes of Indians in the State of Oklahoma. Under an approved oil and gas lease (R. 27) royalties had accrued and accumulated in the hands of the Secretary of the Interior in excess of $1,100,000. Jackson Barnett was of inferior mental capacity, and his intelligence was so stunted and undeveloped that in ordinary business transactions he lacked the capacity to understand and know what he was doing. (R. 193.)

On December 15, 1922, he put his thumb mark to an instrument (R. 40), which among other things purported to authorize, subject to the approval of the Secretary of the Interior, a gift of $550,000 in United States Liberty Bonds derived from the royalties from his allotment to The American Baptist Home Mission Society in trust for certain purposes. On February 1, 1923, the Secretary of the Interior approved that purported gift, and shortly thereafter The American Baptist Home Mission Society delivered the bonds to The Equitable Trust Company of New York under a trust agreement approved by the Secretary. (R. 62–68.) Prior to this alleged gift, the bonds in question had been in possession of the Secretary of the Interior and were subject to his sole supervision and control as property of an Indian whose status was that of a restricted Indian ward of the Government (Sections 1 and 2, Act of May 27, 1908, *infra*, pp. 10, 11).

Suit was commenced January 22, 1925 (R. 1), by Elmer S. Bailey as *prochein ami* for Jackson Barnett, against The Equitable Trust Company of New

York and The American Baptist Home Mission Society, for the purpose of having the bonds and the proceeds declared to be the property of, and impressed with a trust for, the plaintiff, and of having the defendants account for the same, and turn them over to the plaintiff (R. 1, 24, 25).

The United States was granted leave to intervene (R. 104), and in its amended petition of intervention (R. 131) asked that the defendants account for the bonds and proceeds, that any title of the defendants be declared in trust for the benefit of the plaintiff, that the defendants be required to deliver the bonds and the proceeds thereof to the Secretary of the Interior, and that all the trust agreements connected with the bonds be declared void (R. 167, 168). After the order of intervention the United States participated in the preparation of the case and in the trial through the United States Attorney for the Southern District of New York and through Special Assistants to the Attorney General. (R. 295–314.)

On March 6, 1926, the District Court granted a motion of the plaintiff by his *prochein ami*, the United States not opposing, for expense money out of the income of the fund in the sum of $3,000, to be applicable only to such expenses as thereafter were allowed and approved by the court. (R. 126.)

The case was tried November 16 to 24, 1926, before the District Court. (R. 2.) The single issue of fact was the mental condition of Barnett. The single issue of law was whether, in view of Bar-

nett's mentality, the Secretary of the Interior had the power to authorize the disposal of the funds in question. On August 9, 1927, the District Court rendered an opinion (R. 172) holding that the gift was void because of the plaintiff's incompetence and lack of comprehension and understanding of his action in making the same (R. 193); that the gift could not be validated by the approval of the Secretary; and that the defendants should account for and deliver the bonds and proceeds to the Secretary of the Interior to be held by him as the property of plaintiff (R. 195). On November 21, 1927, a decree to this effect was entered. (R. 196.) The decree retained jurisdiction of the cause, and the property, for the purpose of entertaining and deciding applications by counsel for plaintiff and counsel for defendants for allowances out of the property for their services and disbursements.

Such applications were postponed pending an appeal taken by the defendant, The American Baptist Home Mission Society. Such appeal was dismissed May 7, 1928, by the Circuit Court of Appeals because The Equitable Trust Company, another defendant, had not been made a party. (26 F. (2nd) 350.) Application made to this Court for a writ of certiorari was thereafter denied (228 U. S. 626), so that the decision of the District Court became final on the merits of the original action.

Thereafter, the *prochein ami*, counsel for plaintiff, and counsel for defendant, The Equitable Trust Company of New York, asked for allowances.

The affidavits supporting the application by plaintiff's counsel show that the case had been taken by the firm of Hummer & Foster, of Oklahoma, on a contingent basis (R. 210, 233), the fee to be forty per cent of the amount recovered, under a contract, dated December 11, 1924, between Elmer S. Bailey, as guardian of Jackson Barnett, and R. L. Foster, for that firm (R. 260). At the time the amended bill of complaint was filed, and at the time of the trial, Bailey was acting as guardian for the plaintiff and seeking the return of the bonds to him as such guardian, on the theory that while the instrument of gift executed by Barnett was invalid, the Secretary of the Interior had released the bonds from restrictions, but before the case was decided and the decree entered by the District Court, his appointment as guardian had been set aside as invalid. (R. 254; *Appeal of Barnett,* 122 Okla. 160.)

The firm of Hummer & Foster, with which the above-mentioned agreement was made, called in to assist them the firm of Cochran & Ellison, also of Oklahoma, and later the firm of Patterson, Eagle, Greenough & Day of New York, were retained for further assistance. Hummer & Foster also employed the services of McCrory & Monk. (R. 236.)

Prior to the engagement of any of these counsel, the firm of Cochran & Ellison had been employed by a contract dated June 19, 1923, and executed by a number of alleged kindred and heirs apparent of Barnett, to represent them in all matters respecting their interests and rights, both present and future,

in and to the estate of Jackson Barnett, and in all suits and proceedings then pending, or thereafter instituted, by the guardian of Jackson Barnett, or by any other person for him, with a view of protecting and preserving his estate. By the terms of that agreement C. B. McCrory was also retained, and the attorneys named were to receive a reasonable fee to be not less than thirty per cent, nor more than fifty per cent of the value of the property, or of such sum or sums as might be preserved to said alleged kindred, through their services. (R. 314.)

The District Court allowed $7,500 to Elmer S. Bailey, the *prochein ami,* and to his counsel twenty-five per cent of the property involved in the suit, plus $10,000, together with the sum of $4,282.93 expense money (R. 331, 336), aggregating in all approximately $184,000. The Circuit Court of Appeals reduced the allowance for attorneys' fees to $100,000, but affirmed the decision of the District Court in all other respects. (R. 372.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Second Circuit erred:

(1) In holding that the approval of the Secretary of the Interior of what the District Court held to be a void gift of bonds made by Jackson Barnett, released the restrictions on the property.

(2) In refusing to hold that the United States of America, intervener, through its Secretary of the Interior, is entitled to the return and to the custody of the property of Jackson Barnett, undimin-

ished by the payment of any allowance by way of counsel fees, allowances to next friend, or expenses.

(3) In affirming the decree of the District Court directing the payment to Elmer S. Bailey out of the restricted property in question of $7,500 as compensation for his services, and in affirming that decree to the extent of directing the payment of $100,000 out of those restricted funds to counsel employed by Bailey for their services.

(4) The Government contends that the allowances were excessive in amount and beyond fair and reasonable compensation for the services rendered.

REASONS FOR GRANTING THE WRIT

In this case a question of Federal law of importance has been decided, which has not been, but which should be, settled by this Court. A public interest is involved, because a trust fund is at stake, which the United States is administering for the benefit of an Indian ward. The question of the allowance, by order of the court, of counsel fees and expenses incurred by persons acting as next friends and instituting suits on behalf of incompetent Indians, out of their trust funds, without the consent or approval of the Secretary of the Interior either as to the propriety of payment or its amount, is of great importance in the administration of Indian trust funds by the United States.

Wherefore, it is respectfully requested that this petition for a writ of certiorari to review the judg-

ment of the Circuit Court of Appeals for the Second Circuit directing the payment of the allowances in question out of restricted funds be granted.

CHARLES E. HUGHES, Jr.,
Solicitor General.

DECEMBER, 1929.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 331) is unreported. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 372) is reported in 34 F. (2d) 916.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 22, 1929. (R. 377.) A petition for rehearing was duly filed in the Circuit Court of Appeals by certain of the respondents here (R. 378), and overruled by that court on September 18, 1929. The court's order was not filed, however, until September 19, 1929. (R. 384.)

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT

A statement of the facts and of the questions involved and of the assigned errors will be found in the petition.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Act of May 27, 1908, c. 199, 35 Stat. 312, are as follows:

> SEC. 1. That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. * * * and all allotted lands of enrolled full bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other encumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this Act. * * *

SEC. 2. That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: *Provided*, That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise; * * *

The pertinent Rules and Regulations promulgated by the Secretary of the Interior, particularly Regulation No. 24, for the regulation of the disbursement of funds belonging to restricted Indians of the Five Civilized Tribes, provided in effect that no royalties derived from restricted allotted property should be paid to the lessor or his representatives, and that in cases of leases of incompetents the payments should be made to the Superintendent of the Five Civilized Tribes, to be held by him to the credit of the guardian of the incompetent, and paid out by him to the guardian upon his voucher approved by the proper County Court. The above-numbered Regulation provides further that the Superintendent is (R. 148)—

> authorized in his discretion, where considered for the best interests of any adult * * * incompetent lessor * * * for whose account royalties * * * accruing under any lease have been paid to said Superintendent, to withhold the disbursement of such royalties * * * wholly or in part from any such adult, or guardian * * * of any such incompetent * * * until such time or times as the payment thereof is considered best for the benefit of said lessor * * *.

This Regulation was amended on October 7, 1922, as follows (R. 153):

> in such individual cases or classes of cases as the Secretary of the Interior may direct, the Superintendent * * * shall cause such payments as may be authorized to be made out of the royalties and other individual Indian funds of the restricted Indians, minors, and incompetents, to be paid direct to the Indians entitled thereto or to be otherwise paid out for their benefit and use as the Secretary of the Interior may authorize in said cases.

ARGUMENT

I

The outstanding question presented by the petitioner is the power and authority of the court below to administer and disburse funds from the property in question. The bonds involved, and the income therefrom, are impressed with the same

trust as the allotted lands of the Indian ward of the Government from which the bonds were derived. It is well settled that the trust imposed upon the United States in the administration of restricted Indian lands extends to the proceeds derived therefrom, and that where the alienation of such lands is restricted, moneys derived therefrom are likewise restricted. These bonds were derived from royalties from oil and gas produced under a lease of Jackson Barnett's allotment approved by the Secretary of the Interior. In the case of *United States* v. *Brown*, 8 F. (2d) 564, 567, the Court, referring to the Act of May 27, 1908, *supra*, said:

> The act does in terms, however, authorize the making of these leases subject to the approval of the Secretary of Interior. It must be conceded that the royalties accruing therefrom are lodged with the officers of that department impressed with the same trust as are the lands themselves. *United States* v. *Gray*, 201 F. 291, 119 C. C. A. 529; *United States* v. *Hinkle* (C. C. A.) 261 F. 518; *United States* v. *Moore* (C. C. A.) 284 F. 86.

See also *Parker* v. *Richard*, 250 U. S. 235.

II

The restrictions imposed by Congress against alienation are not personal to the allottee. They inhere in the status of the lands. They run with the land. *Egan* v. *McDonald*, 246 U. S. 227; *Levindale Ledd Co.* v. *Coleman*, 241 U. S. 432; *Bowling* v. *United States*, 233 U. S. 528. They prohibit both

voluntary and involuntary alienation. Such lands are not subject to judicial sale on execution. No part of them can be sold under a judicial decree of partition. *United States* v. *Bellm*, 182 Fed. 161. They are tax exempt. *United States* v. *Brown, supra; United States* v. *Thurston County*, 143 Fed. 287. They are inalienable not only in the hands of the allottee but in the hands of the heir as well. *Parker* v. *Richard, supra; United States* v. *Aaron*, 183 Fed. 347; *Goodrum* v. *Buffalo*, 162 Fed. 817. See also *Heckman* v. *United States*, 224 U. S. 413, 446–447.

III

The District Court in its opinion in *Barnett* v. *Equitable Trust Co.*, 21 F. (2d) 325, declared the gift to be null and void. That court said (p. 332):

> From all the evidence in the case, I am strongly of the opinion that the gifts which purport to have been made by Barnett can not be regarded as his acts and deeds, and must be held to be void and of no effect.

Without the approval of the Secretary of the Interior, Barnett's action, even had he been competent, would have been a nullity. If Barnett's act was void, there was nothing for the approval of the Secretary to act upon, and the alleged transfer was equally a nullity. *Jennings* v. *Wood*, 192 Fed. 507.

Because of the restricted character of the particular property in question held by the Secretary of the Interior, although wrongfully out of his immediate possession, the court could not disburse it, or

order disbursement therefrom. That, we submit, is solely within the power of the Secretary of the Interior, since the administration of the trust was reposed in him by law. His attempted action in partially releasing restrictions from the property having been a nullity, disbursement of the same thereafter could be lawfully made only with his approval. The courts can not assume and perform this official duty for him. *First Moon* v. *White Tail*, 270 U. S. 243; *Work* v. *Rives*, 267 U. S. 175; *Lane* v. *Mickadiet*, 241 U. S. 201; *Litchfield* v. *Register and Receiver*, 9 Wall. 575, 578.

On the determination of the status of the property the United States was entitled to its return to the Secretary of the Interior, undiminished. The right of the United States to have it so returned to him was not affected by the fact that he was imposed upon as to the facts or had misinterpreted his authority and allowed the property to pass out of his immediate possession. His duty as to this property, under the law, remained unchanged and entirely unaffected by his prior invalid acts. His attempted removal of the restrictions being nugatory did not convert the property involved into "free funds," as stated by the court below.

The decree of the District Court became final November 21, 1927, and the appeal therefrom, having been dismissed on jurisdictional grounds, that decree became the sole determination of the original case on the merits, and must stand as the law of the

case. That decree established the status of the property involved, as restricted Indian funds. (R. 173, 193.) The Circuit Court of Appeals, we submit, had no power, in this present proceeding, to construe the funds here involved to be "unrestricted and free funds."

The duty devolves upon the United States to protect the Indian, and discharge the trust assumed by it. To permit this trust property to be charged with counsel fees and expenses of voluntary next friends in its recovery, after it had been unlawfully obtained from the officer of the Government charged with its care, would appear to be a violation of the trust by the United States. The United States must, we submit, assume the whole burden of recovering the property, and executing the trust which it has assumed. Its intervention in the suit was for that purpose, and by its intervention it performed that duty.

IV

The interests of the United States in this case, and of the next friend, Elmer S. Bailey, and his attorneys, were in material aspects adverse from the beginning. They were suing upon the theory that the action of the Secretary of the Interior released the funds from his supervision and control and sought to recover the property for Bailey, then acting as guardian under an invalid appointment of the County Court in Oklahoma. (R. 25.) Not until after the suit was tried in the District Court was

Bailey's appointment as guardian vacated by the Supreme Court of Oklahoma. *Appeal of Barnett*, 122 Okla., 160. But that did not alter the matter, for had the action of the Secretary of the Interior attempting to release the restrictions been valid, upon the decree of the court annulling the gifts made by Barnett, he would have been entitled to the property free from any control by the Secretary. From the beginning, the United States sought to regain the funds, and restore them to the Secretary of the Interior. (R. 102.) The attorneys employed by the next friend had a double interest in the suit. McCrory & Monk and Cochran & Ellison had contracts with the alleged kindred and "heirs apparent" of Jackson Barnett to assist in any pending litigation looking to the protection and conservation of Barnett's property. (Exhibit 82, R. 314-317.) In a single respect were the United States and the plaintiff at one—to have the deed of gift set aside. The efforts of the next friend and his attorneys to recover the property for Barnett, free from restrictions, or for his guardian, failed. They acquiesced in the decree setting aside the gift and restoring the funds to the Secretary, although that result was not what they had prayed for.

We submit that the facts appearing in the record with respect to the nature of the litigation and of the respondents' services show that the allowances were at least excessive in amount. In view of the character of the fund here involved and of the trust relation of the United States to the Indian

beneficiary thereof, it is submitted that the question whether charges which would deplete it are excessive has an importance which the ordinary question of the amount of attorneys' fees does not present, and that it may properly be taken into consideration in connection with the principal question of which review is sought.

CONCLUSION

It is submitted that the decision below was wrong and should be reviewed by this Court upon a writ of certiorari.

Respectfully submitted.

CHARLES E. HUGHES, JR.,
Solicitor General.

SETH W. RICHARDSON,
Assistant Attorney General.

GEORGE C. BUTTE,
Special Assistant to the Attorney General.

NAT M. LACY,
Attorney.

DECEMBER, 1929.

U. S. GOVERNMENT PRINTING OFFICE: 1930

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 530

UNITED STATES OF AMERICA, PETITIONER

v.

THE EQUITABLE TRUST COMPANY OF NEW YORK et al.

MEMORANDUM OF PETITIONER IN OPPOSITION TO SUGGESTION OF DIMINUTION OF RECORD AND MOTION FOR CERTIORARI TO CORRECT SAME

Certain of the respondents seek a writ of certiorari directing the Circuit Court of Appeals for the Second Circuit to certify to this Court certain papers, consisting of two classes:

(*a*) The first class is composed of depositions, testimony, exhibits, and briefs which were submitted to, and filed in, the District Court, but which were not incorporated in the printed transcript as filed in the Circuit Court of Appeals or in this Court.

The omission of this material from the printed transcript is easily explained.

On February 19, 1929, counsel representing all of the parties entered into a stipulation in the District Court (R. 359–362) which provided that in addition to certain specified documents, the record on appeal should consist of the following:

> And in addition to the foregoing all depositions, testimony, exhibits, briefs and other papers submitted to and filed in the District Court in the above entitled matter not included in the matters hereinbefore specifically enumerated.

This stipulation was followed by an order (R. 363–367) signed by Circuit Judge Manton, which is dated February 20, 1929, and which provided:

> AND IT IS FURTHER ORDERED that all depositions, testimony, exhibits, briefs, and all other papers included by the stipulation of the parties to this appeal filed in the United States District Court on the 20th day of February, 1929, as constituting the Record on Appeal, *may be omitted from and not printed in the Transcript of Record on appeal* but may be referred to and submitted to the Court upon the argument of the appeal, by any of the parties to the appeal, with the same force and effect as though the same were printed and included in the Transcript of Record herein. (Italics ours.)

At the foot of this order was endorsed a consent to its entry, signed by the solicitors for all the parties hereto and bearing the date February 19, 1929. (R. 367.)

On March 8, 1929, counsel entered into a further stipulation (R. 368–369), which reads:

> IT IS HEREBY STIPULATED AND AGREED, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

The certificate of the clerk of the District Court to the transcript certified to the Circuit Court of Appeals was to the same effect. (R. 370–371.)

It is unnecessary to determine the status of the omitted material either in the Circuit Court of Appeals or in this Court. The important thing is that it did not form a part of the printed record in the Circuit Court of Appeals, and consequently under Paragraph 7 of Rule 38 of this Court does not form a part of the printed record which the Government was required to file here with its petition for certiorari. Paragraph 7 provides that "where the record has been printed for the use of the court below and the necessary copies as so printed are furnished, it shall not be necessary to reprint it for this court but only to print such additions as may be necessary to show the proceedings in that court and the opinions there," and that "When the petition is presented it will suffice to furnish ten copies of the record as printed below together with the proceedings and opinion in that court * * *"

The printed records filed by the Government with its petition for certiorari meet all the requirements of the rule.

(*b*) The papers of the second class mentioned in respondents' suggestion and motion are not material upon the question of the timeliness of petitioner's application for certiorari. While it is true that a *decision* was rendered on September 7, 1929, and filed on September 11, 1929, denying respondents' petition for rehearing (Appendix to respondents' suggestion and motion, pp. 4, 6), the actual *order* of denial was dated September 18, 1929 (R. 384), and was filed September 19, 1929. (R. 384; appendix to respondents' suggestion and motion, p 6.) This followed a practice of long standing in the Circuit Court of Appeals for the Second Circuit, as appears from the affidavit of the clerk of that court, a copy of which is attached as an appendix hereto. It is therefore apparent that the *decision* of September 7th upon which respondents rely is tantamount to the opinion which precedes the judgment in a case where no petition for rehearing is filed. In such a case it is clear that the three months' period for filing a petition for certiorari does not begin to run until the judgment is entered (Sec. 8 (a), Act of February 13, 1925), and it is submitted that there is no logical reason why a like rule should not govern in a case such as this where, under the local practice, the order denying a petition for rehearing is made subsequent to the decision that the petition should be denied. *Morse* v. *United States*, 270 U. S. 151, is not authority to the contrary. The

statement in that case (pp. 153–154) that "the time within which the proceeding to review must be initiated begins from the *date of the denial*" of the petition for rehearing must be construed in the light of the cases which the court cites in support thereof. The language used generally in those cases is that the time for review is suspended until the petition for rehearing or motion for a new trial, as the case may be, is "disposed of." Under the practice obtaining in the Second Circuit, we submit that the petition for rehearing is not "disposed of" until the order is made. Cf. *Andrews* v. *Virginian Ry. Company*, 248 U. S. 272.

Respondents further contend that the rule that the filing of a petition for rehearing suspends the running of the period for applying for a writ of certiorari, is only applicable where the petitioner for rehearing is also the petitioner for certiorari. (Brief in opposition, p. 2.) Let us apply that rule to the instant case. The judgment of the Circuit Court of Appeals was entered July 22, 1929. (R. 378.) Under respondents' theory, the Government was required to file its petition for certiorari by October 22, 1929, but the respondents, having filed a petition for rehearing, which was denied in September, 1929, could have filed a cross-petition for certiorari, if they had so desired, in December, 1929. We submit that Congress never intended such a piecemeal review of a judgment.

Although admitting that the "date of the issuance of the mandate is not of itself controlling," respondents contend that the order of September 18, 1929, denying the petition for rehearing was a nullity because the mandate had previously issued, and cite in support of their contention *Peck* v. *Sanderson*, 18 How. 42. (Brief in opposition, p. 5.) In that case the rehearing was sought at a term subsequent to that at which the judgment was entered and the mandate issued. It is well settled that after the term has ended all final judgments of a court pass beyond its control unless appropriate steps to set aside, modify, or correct them have been taken during the term. *Bronson* v. *Schulten*, 104 U. S. 410, 415. In the instant case the judgment of the Circuit Court of Appeals was entered on July 22, 1929, during the "October Term, 1928" of that court. (R. 372, 378.) On the same day the court extended the time within which respondents could file a petition for rehearing until August 15, 1929. (Appendix to respondents' suggestion and motion, pp. 7–8.) The petition for rehearing was filed on August 12, 1929. (Appendix to respondents' suggestion and motion, p. 5.) *Peck* v. *Sanderson*, *supra*, is obviously not in point.

The Government's petition for writ of certiorari was filed in this Court on December 18, 1929, which was within three months of the order dated September 18th denying the petition for rehearing. The petition for certiorari was, we submit,

filed within the period prescribed by Section 8 (a) of the Act of February 13, 1925.

The motion should be denied.

Respectfully submitted.

CHARLES E. HUGHES, Jr.,
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JANUARY, 1930.

APPENDIX

UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify as follows:

In December, 1928, general rules of the United States Circuit Court of Appeals for the Second Circuit were promulgated. Rule 29 of those general rules is, in part, as follows:

> Upon the filing of any decision by this court the clerk shall forthwith, or at any later time, if the court thinks justice requires it, enter the proper order, and will thereupon prepare and tax the bill of costs, giving to the parties reasonable time to file with him their proposed orders and bills of costs, with proof of service of the same upon their opponents.

A similar rule in the exact language above quoted, or in substantially similar language, has been in effect in this court since 1918.

Pursuant to this rule or its antecedents, it has been the uniform practice in this court since 1918 for the Clerk to enter an order upon any decision of the court, including a decision denying a petition for rehearing, approximately one week after the filing thereof.

Dated, New York, January 8, 1930.

[SEAL.] WM. PARKIN, *Clerk.*

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No. 21

In the Supreme Court of the United States

OCTOBER TERM, 1929

UNITED STATES OF AMERICA, PETITIONER

v.

THE EQUITABLE TRUST COMPANY OF NEW YORK, MURRAY, ALDRICH & ROBERTS; EDWARD J. PATTERSON; J. FREDERICK EAGLE; WILLIAM GREENOUGH; SHERMAN DAY; CARROLL G. WALTER AND DODGE L. MARKS, COMPOSING THE FIRM OF PATTERSON, EAGLE, GREENOUGH & DAY; RAYBURN L. FOSTER AND R. B. F. HUMMER, COMPOSING THE FIRM OF HUMMER & FOSTER; ALMOND D. COCHRAN, SURVIVING PARTNER OF THE FIRM OF COCHRAN & ELLISON; C. B. MCCRORY AND DUDLEY C. MONK, COMPOSING THE FIRM OF MCCRORY & MONK; AND ELMER S. BAILEY, INDIVIDUALLY AND AS PROCHEIN AMI OF JACKSON BARNETT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 530

UNITED STATES OF AMERICA, PETITIONER

v.

THE EQUITABLE TRUST COMPANY OF NEW YORK; Murray, Aldrich & Roberts; Edward J. Patterson; J. Frederick Eagle; William Greenough; Sherman Day; Carroll G. Walter and Dodge L. Marks, Composing the Firm of Patterson, Eagle, Greenough & Day; Rayburn L. Foster and R. B. F. Hummer, Composing the Firm of Hummer & Foster; Almond D. Cochran, Surviving Partner of the Firm of Cochran & Ellison; C. B. McCrory and Dudley C. Monk, Composing the Firm of McCrory & Monk; and Elmer S. Bailey, Individually and as Prochein Ami of Jackson Barnett

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 160) is reported in 21 F. (2d) 325. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 175) is reported in 34 F. (2d) 916.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 22, 1929. (R. 180.) A petition for rehearing was duly filed in the Circuit Court of Appeals by certain of the respondents here (R. 181), and overruled by that court on September 18, 1929. The court's order was not filed, however, until September 19, 1929. (R. 181.) Petition for certiorari was filed December 18, 1929 (R. 182), and was granted January 20, 1930. (R. 181.)

The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The question presented is:

Whether in view of the final decision and decree of the District Court in the original case that the attempted gift, transfer, and assignment of the restricted funds to the defendants therein was null and void, the courts below had any power to charge the restricted property with allowances for attorneys' fees, services, and disbursements. The Government also contends that the allowances were excessive in amount.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Act of May 27, 1908, c. 199, 35 Stat. 312, are as follows:

> SEC. 1. That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of

the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed blood Indians having less than half Indian blood including minors shall be free from all restrictions. * * * and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this Act. * * *

SEC. 2. That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: *Provided*, That leases of restricted lands for oil, gas or other mining purposes, leases of

restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: * * *.

Other statutory provisions having some direct or indirect bearing on the questions presented in this case will be referred to later in this brief.

The pertinent Rules and Regulations promulgated by the Secretary of the Interior, particularly Regulation No. 24, for the regulation of the disbursement of funds belonging to restricted Indians of the Five Civilized Tribes, provided in effect that no royalties derived from restricted allotted property should be paid to the lessor or his representatives, and that in cases of leases of incompetents the payments should be made to the Superintendent of the Five Civilized Tribes, to be held by him to the credit of the guardian of the incompetent, and paid out by him to the guardian upon his voucher approved by the proper County Court. The above numbered Regulation provides further that the Superintendent is (R. 72)—

> authorized in his discretion, where considered for the best interests of any adult, * * * incompetent lessor, * * * for whose account royalties * * * accruing under any lease have been paid to said Superintendent, to withhold the disbursement of such royalties * * * wholly or in part from any such adult or guardian * * * of any such * * * incompetent * * * until such time or

> times as the payment thereof is considered best for the benefit of said lessor * * *.

This Regulation was amended on October 7, 1922, as follows (R. 75):

> in such individual cases or classes of cases as the Secretary of the Interior may direct, the Superintendent * * * shall cause such payments as may be authorized to be made out of the royalties and other individual Indian funds of the restricted Indians, minors, and incompetents, to be paid direct to the Indians entitled thereto or to be otherwise paid out for their benefit and use as the Secretary of the Interior may authorize in said cases.

STATEMENT

Jackson Barnett, a full-blood Creek Indian now seventy-eight years of age, is possessed of land allotted to him by the Government from the tribal lands of the Creek or Muskogee Nation, one of the Five Civilized Tribes of Indians in the State of Oklahoma. (R. 2–3.) Under an approved oil and gas lease (R. 14) royalties had accrued from his allotment and accumulated in the hands of the Secretary of the Interior in excess of $1,100,000. (R. 67.) Jackson Barnett was of inferior mental capacity, and his intelligence was so stunted and undeveloped that in ordinary business transactions he lacked the capacity to understand and know what he was doing. (R. 94.)

On December 15, 1922, he put his thumb mark to an instrument (R. 20), which among other things purported to authorize, subject to the approval of

the Secretary of the Interior, a gift of $550,000 derived from the royalties from his allotment, to The American Baptist Home Mission Society in trust for certain purposes. On February 1, 1923, the Secretary of the Interior approved that purported gift (R. 75–76), and shortly thereafter The American Baptist Home Mission Society delivered certain bonds to The Equitable Trust Company of New York under a trust agreement approved by the Secretary. (R. 31–35.) Prior to this alleged gift, the bonds in question had been in possession of the Secretary of the Interior in connection with the above menticned fund, belonging to Barnett, which fund was subject to the sole supervision and control of the Secretary, as property of an Indian whose status was that of a restricted Indian ward of the Government. (Sections 1 and 2, Act of May 27, 1908, *supra*.)

The precise status of the particular bonds here involved is not wholly clear. Pleadings in the court below dealt with the bonds as the property of Barnett, and the bonds themselves as constituting the estate of Barnett which was held in trust by the United States. Apparently, the statute involved (Act of May 25, 1918, c. 86, Sec. 28, 40 Stat. 561, 591–592; U. S. C. Title 25, Sec. 162) did not authorize the United States to invest the funds in bonds, but only to deposit the funds secured by bonds. There may be some question, therefore, whether the bonds here in question were actually bonds belonging to Barnett or were bonds belonging to the United States. But as we later show, the Government's contentions apply to either situation.

Suit was commenced January 22, 1925 (R. 1), by Elmer S. Bailey as *prochein ami* for Jackson Barnett, against The Equitable Trust Company of New York and The American Baptist Home Mission Society, for the purpose of having the bonds and the proceeds declared to be the property of, and impressed with a trust for, the plaintiff, and of having the defendants account for the same and turn them over, not to the Secretary of the Interior but to the plaintiff (R. 1, 12–13).

The United States was granted leave to intervene on January 20, 1926 (R. 51), and in its amended petition of intervention (R. 63–64) asked that the defendants account for the bonds and proceeds, that any title of the defendants be declared in trust for the benefit of Jackson Barnett, that the defendants be required to deliver the bonds and the proceeds thereof *to the Secretary of the Interior* and that all the alleged trust agreements connected with the bonds be declared void (R. 81–82).

After the order of intervention, the United States participated in the preparation of the case and in the trial through the United States Attorney for the Southern District of New York, and through Special Assistants to the Attorney General. (R. 142–152.)

On March 6, 1926, the District Court granted a motion of the plaintiff by his *prochein ami*, the attorneys for the United States not opposing, for expense money out of the income of the fund in the sum of $3,000, to be applicable only to such expenses as

thereafter were allowed and approved by the court. (R. 62.)

The case was tried November 16 to 24, 1926, before the District Court. (R. 1–2.) The single controlling issue of fact on the Government's pleading was the mental condition of Barnett. The single important issue of law was whether, in view of Barnett's mentality, the Secretary of the Interior had the power to authorize the disposal of the funds in question. On August 9, 1927, the District Court rendered an opinion (R. 83) holding that the gift was void because of the plaintiff's incompetence and lack of comprehension and understanding of his action in making the same (R. 94–95); that the gift could not be validated by the approval of the Secretary; and that the defendants should account for and deliver the bonds and proceeds to the Secretary of the Interior to be held by him as the property of plaintiff (R. 95–96). On November 21, 1927, a decree to this effect was entered. (R. 96.) The decree, however, retained jurisdiction of the cause, and the property, for the purpose of entertaining and deciding applications by counsel for plaintiff, and counsel for defendants, for allowances out of the property for their services and disbursements.

Such applications were postponed pending an appeal taken by the defendant The American Baptist Home Mission Society. Such appeal was dismissed May 7, 1928, by the Circuit Court of Appeals because The Equitable Trust Company, another defendant, had not been made a party. 26 F. (2d) 350. Application made to this Court for a writ of certiorari

was thereafter denied (278 U. S. 626), so that the decision of the District Court became final on the merits of the original action.

Thereafter the *prochein ami*, counsel for plaintiff, and counsel for defendant The Equitable Trust Company of New York asked for allowances. The affidavits supporting the application by plaintiff's counsel show that the case had been taken by the firm of Hummer & Foster, of Oklahoma, on a contingent basis (R. 101, 113), the fee to be forty per cent of the amount recovered, under a contract dated December 11, 1924, between Elmer S. Bailey, as guardian of Jackson Barnett, and R. L. Foster, for that firm (R. 127), and approximately a month later the suit was filed. The pertinent parts of the contract read (R. 129–130):

> * * * Parties of the second part are further authorized to employ such other legal counsel as they may deem advisable, at their own expense.
>
> In consideration of the services to be rendered by the parties of the second part the party of the first part does hereby agree to pay to said parties of the second part a sum equal to forty per cent of such amount as may be recovered by virtue of their efforts, whether by final judgment, or by compromise, or otherwise, and the party of the first part does hereby transfer, assign, convey, and set over unto the parties of the second part, their heirs and assigns, forty per cent of the causes of action of the said Jackson Barnett for the recovery of said sums or any part thereof.

Party of the first part further agrees to advance the necessary court costs in the filing of said actions, and agrees to advance or to reimburse parties of the second part for their reasonably necessary expenses in performing their duties under this contract to such an extent and at such times as funds belonging to said incompetent may come into the hands of the party of the first part.

Parties of the second part hereby accept the employment upon the terms and conditions as above set out and agree to use due diligence in the prosecution of the causes of action of the said Jackson Barnett to final termination.

This agreement shall be binding upon the estate of Jackson Barnett, his heirs, executors, administrators, trustees, and assigns.

At the time the amended bill of complaint was filed and at the time of the trial Bailey was acting as guardian for the plaintiff, but before the case was decided and the decree entered by the District Court, his appointment as guardian had been held invalid by the Supreme Court of Oklahoma. (R. 124; *Appeal of Barnett*, 122 Okla. 160.)

The firm of Hummer & Foster, with which the above-mentioned contingent-fee agreement was made, called in to assist them, also on a contingent basis, the firm of Cochran & Ellison, also of Oklahoma, and later the firm of Patterson, Eagle, Greenough & Day, of New York, and the firm of McCrory & Monk of Oklahoma. (R. 114, 115.)

Prior to the engagement of any of these counsel, the firm of Cochran & Ellison, of Oklahoma, had been

employed under a contingent-fee contract dated June 19, 1923, and executed by a number of alleged "kin to and heirs apparent of" Barnett, to represent them in all matters respecting their interests and rights, both present and future, in and to the estate of Jackson Barnett, and in all suits and proceedings then pending, or thereafter instituted, by the guardian of Jackson Barnett, or by any other person for him, with a view of protecting and preserving his estate. By the terms of that agreement, C. B. McCrory was also retained, and the attorneys named were to receive a reasonable fee to be not less than thirty per cent, nor more than fifty per cent of the value of the property, or of such sum or sums as might be preserved to said alleged kindred, through their services. (R. 152.)

Under these contingent-fee contracts, the adventure initiated by these respondents was conditioned upon the ultimate placing of the funds in question in the hands of Bailey as guardian, Barnett being incompetent. There was no way in which the payments contemplated by the contracts could be carried out unless the moneys were freed from restrictions and placed in the hands of one of the contracting parties, Bailey, and such was the prayer of the bill of complaint. (R. 9–10, 13.)

The District Court, over the objections of the Government, allowed counsel for Elmer S. Bailey twenty-five per cent of the property involved in the suit, plus $10,000, and directed the payment to them out of said property of the total sum of $184,881.08

for their counsel fees. The court also allowed counsel $4,282.93 expenses which they had incurred, and to Bailey, as compensation for his services $7,500. The Court directed the payment of all of these sums out of the fund in the hands of the Trust Company, and their deduction from the amount to be restored to the Secretary of the Interior under its decree. (R. 162–163, 167–168.) Upon appeal by the United States on the grounds both that the District Court was not justified in making such awards out of the fund in any amount and that the awards were in any case excessive, the Circuit Court of Appeals reduced the amount allowed to counsel for their fees to $100,000, but otherwise affirmed the decision of the District Court, including the allowance to Bailey and the allowance for expenses, representng a total diminution of the fund in the amount of $111,782.93.

WHERE THE FUND CAME FROM

The one hundred and sixty acres of land from which the royalties invested in the bonds in question were derived was Barnett's allotment in severalty, made upon the division of the Creek Tribal lands under the Act of June 28, 1898, c. 517, 30 Stat. 495, known as the Curtis Act. The United States had, in pursuance of treaty stipulations, conveyed to the Creek Tribe of Indians the Creek country

> to have and to hold the same unto the said tribe of Indians so long as they shall exist as a nation and continue to occupy the country hereby assigned to them. (*Tiger* v. *Western Investment Co.*, 221 U. S. 286, 299, 300.)

By its patent, title to the Creek lands had been by the United States vested in the Tribe, subject to extinguishment only by the extinguishment of the Tribe, or their removal from the land.

By treaty, the Creeks had been guaranteed the right to govern themselves. A continuance of the tribal government had been contemplated. But the tribal customs and laws could not be preserved, and Congress had adopted the policy of allotting the Creek lands in severalty to the members of the Tribe. *Woodward* v. *De Graffenried*, 238 U. S. 284, 293, 294.

By the Act of March 3, 1893, c. 209, 27 Stat. 612, 645, Congress created the Dawes Commission, and, by Section 15 of that Act, consented to the allotment of the lands of the Five Civilized Tribes, one of which is the Creeks, in severalty, and provided that—

> upon the allotment of the lands held by said tribes respectively the reversionary interest of the United States therein shall be relinquished and shall cease.

The Dawes Commission then proceeded, under Section 11 of the Curtis Act, c. 517, 30 Stat. 495, 497, to allot the exclusive use and occupancy of the land among the citizens of each Tribe. Afterwards the original Creek Agreement Act of March 1, 1901, c. 676, 31 Stat. 861, was made with the Tribe, and as modified by the Supplemental Creek Agreement Act of June 30, 1902, c. 1323, 32 Stat. 500, provision was made for the issuance of patents, or deeds, conveying all the right, title, and interest of the Creek

Nation to the lands within the boundaries of each individual allotment, and relinquishing the right, title, and interest of the United States therein, the lands so conveyed to be inalienable for a period of five years, except with the approval of the Secretary of the Interior. The effect of the allotment, and the deed to the same, was to vest title in the allottee, subject only to such restrictions against alienation as Congress might impose.

The Act of May 27, 1908, finally embodied the restrictions on these allotments, and that Act is the source of the authority vested in the Secretary of the Interior over the allotment of Barnett and the proceeds thereof, and of the restrictions thereon.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that the approval of the Secretary of the Interior of what the District Court held to be a void gift of bonds made by Jackson Barnett, released the restrictions on the property.

(2) In refusing to hold that the United States of America, intervener, through its Secretary of the Interior, is entitled to the return and to the custody of the property of Jackson Barnett, undiminished by the payment of any counsel fees, allowances to next friend, or expenses.

(3) In affirming the decree of the District Court directing the payment to Elmer S. Bailey out of the restricted property in question of $7,500 as compensation for his services, and in affirming that decree to the extent of directing the payment of $100,000

out of these restricted funds to counsel employed by Bailey for their services.

(4) The Government contends that the allowances were excessive in amount, and beyond fair and reasonable compensation for the services rendered.

SUMMARY OF ARGUMENT

The bonds here involved, if belonging to Barnett and representing royalties on an oil and gas mining lease covering the allotment of Jackson Barnett, a restricted full-blood Creek Indian, were subject to the same restrictions as the allotment. They were not subject to voluntary alienation by Barnett without the approval of the Secretary of the Interior; nor were they subject to involuntary alienation.

The gift to the Mission Society approved by the Secretary of the Interior, having been declared void by the District Court, could not operate to release the restrictions upon the property. The decree of the District Court ordering the restoration of the bonds to the Secretary of the Interior was a final adjudication that the restrictions had not been released. The courts could neither remove nor reimpose the restrictions.

The bonds in so far as they represented the fund belonging to Barnett were, because of the restrictions, held by the United States in trust for Barnett who was an incompetent Indian ward of the Government. This trust, arising out of the restrictions, was an instrumentality employed by the Federal Government in pursuance of its general Indian policy for the protection of the Indians. Being an instrumentality

of the Federal government, the property was not subject to administration by the courts.

Regardless of the restricted and trust character of the bonds, the court in this case had no power to enter a judgment against Jackson Barnett for counsel fees, and order the payment of the same out of the property in controversy. The respondents having entered into this litigation under contingent fee contracts, and such contingent fee contracts never having been performed by the respondents according to their terms, they are not now entitled to receive compensation on a *quantum meruit* basis.

In any event, the counsel fees allowed are excessive in amount.

ARGUMENT

I

THE DECISION OF THE COURT BELOW WAS AN INTERFERENCE WITH THE EXERCISE OF THE GOVERNMENTAL POWER OF THE UNITED STATES OVER THE PROPERTY OF ITS INDIAN WARDS

The effect of the decision below was to take more than $110,000, by way of attorneys' fees and expenses, out of a trust fund which the United States, under proper Acts of Congress, was supposed to be administering for the benefit of one of its mentally deficient Indian wards. This invasion of this trust fund was had without the consent of the owner of the fund, Jackson Barnett, since he was incompetent, and over the objection of the United States.

The reason offered by the courts below for invading this fund is, that, as the physical possession of the fund had been lost by an illegal act of its custodian,

the Secretary of the Interior, and since the action of the court was necessary to return the fund to the Secretary as its only lawful custodian, the court had the right to diminish the fund for the purpose of paying attorneys' fees, alleged to have been incurred in carrying on the proceedings in court to secure the return of the fund to the Secretary of the Interior. The United States submits that the court below was not authorized to diminish the trust fund for any expense or purpose whatsoever, except with the consent of the United States, as evidenced by the approval of the Secretary of the Interior.

The policy of restricting Indians in the disposition of their property has been one of the most beneficent policies exerted by the United States toward its helpless Indian wards. It has been long established by the decisions of this Court, that the United States, through Congress, has plenary power over the handling and administration of Indian property. The most familiar exercise of this power is presented in the well-known restrictions surrounding the conveyance of Indian lands, homesteads, and allotments. Such restrictions have, by the express declaration of this Court, been held to follow the incomes and royalties, rents and accruals coming to Indians out of the Indian lands. *Sunderland* v. *United States*, 266 U. S. 226; *United States* v. *Noble*, 237 U. S. 74, 197 Fed. 292; *National Bank of Commerce* v. *Anderson*, 147 Fed. 87, 90; *United States* v. *Brown*, 8 F. (2d) 564, 567.

Grants of citizenship and civil rights to Indians have been held not to limit the power of the United

States to control the disposition of the property of the Indian. With reference to the *lands* of the Indians, the Indian is left in possession and use of the land, but its alienation or encumbrance is prevented by the governmental restrictions. With respect to the likewise restricted income from the lands, the Indian is not left in possession, but such income, when restricted, comes into the possession of the United States, impressed with all of the restrictions with which the lands were impressed. This possession of the United States of Indian funds thus acquired is more than a mere relation of trustee and beneficiary. It is an exercise of a sovereign, governmental right and policy on the part of the United States. The administration of such funds by the United States thus becomes an inherent part of the exercise of sovereign, governmental functions by the Government itself. It therefore follows that the authority to enforce such restrictions is the necessary complement of the power to impose them, and that power recognizes no limitations that are inconsistent with the discharge of the national duty.

In the carrying out of any acts or steps by the United States for the purpose of fulfilling to the utmost extent these governmental obligations, no attention need be paid to the Indian ward or the representatives of the Indian ward, and such ward or his representatives may assume no attitude with respect to the interest of the ward, which would derogate from the complete representation of the ward, and his interests, by the United States. There-

fore, whatever initial steps may have been taken by or on behalf of an Indian ward by persons not representing the United States, when the United States assumes to act or proceed, such action on the part of the United States necessarily precludes the prosecution of suits by any and all persons, including the ward himself, for any similar purpose relating to the same property. *Heckman* v. *United States*, 224 U. S. 413; *Tiger* v. *Western Investment Co.*, 221 U. S. 286.

It further follows from these decisions, that the restrictions thus imposed upon Indian property in the exercise of the governmental direction and policies of the United States, being set forth in public laws, must be held to be matters of general knowledge. Those who deal with such Indians must be held at all times to have full and complete knowledge of such restrictions, their purpose, and the fact that they constitute an intentional exercise of governmental control on the part of the United States, and therefore, that no authority other than the United States may, to the slightest extent, limit, embarrass, or interfere with, the exercise of such governmental powers on the part of the United States in the control, administration, and protection of such Indian funds.

Thus it has been long established by the courts that no reason, excuse, or device is available to interfere with, limit, embarrass, or withdraw restrictions placed by the United States, through Congress, upon specific Indian property. *United States* v. *Thurston County*, 143 Fed. 287; *Goodrum* v. *Buffalo*, 162 Fed. 817.

Attempts to avoid restrictions through State probate proceedings, through partition proceedings, through the enforcement of judgments for debts contracted by the Indian, through State statutes with respect to suits to quiet title, through State statutes defining the right to dispose of property by will, through the attempt to exercise in court asserted rights based upon forfeiture, reverter, estoppel and the like, as well as numerous attempts made to levy taxes upon Indian property, have all failed, since they are unlawful attempts to avoid or impede the governmental authority and policy of the United States in the handling of the property of its Indian wards. *Dawes* v. *Brady*, 112 Okla. 289; *Eastern Oil Co.* v. *Harjo*, 57 Okla. 676; *Eysenbach* v. *Naharkey*, 246 Pac. 603 Okla.; *Coleman* v. *Battiest*, 65 Okla. 71; *Choctaw Lumber Co.* v. *Coleman*, 56 Okla. 377; *First State Bank of Newitt* v. *Lowry*, 72 Okla. 115; *Mortgage & Debenture Co.* v. *Burrows*, 75 Okla., 94; *United States* v. *Thurston County, supra; United States* v. *Rickert*, 188 U. S. 432.

In the case at bar, the United States had possession of a trust fund belonging to Jackson Barnett, amounting to over $1,000,000. This trust fund was held by the United States for the benefit of Barnett, in the exercise of the governmental purposes and functions to which we have above adverted. The Secretary of the Interior, *by a void act*, physically transferred possession of a portion of this trust fund to The Equitable Trust Company of New York. The circumstances and alleged reasons for such transfer,

which have been recited in our statement of facts, are probably immaterial, since the decision of the District Court holding that the act of the Secretary of the Interior was void and without authority of law stands as the law of this case. The fund in question was a restricted fund, and since the act of the Secretary of the Interior was void, it necessarily follows that the fund came into the hands of the Equitable Trust Company likewise impressed with restrictions which it must be conclusively presumed the Trust Company knew were restrictions imposed by the United States in the exercise of its governmental policy and control over the property of Jackson Barnett.

It is contended by respondents that the Secretary's approval of the gift must be construed as a removal of restrictions. In the court below respondents said: "the only reason for presenting the gift to the Secretary for approval was that by approving it he would thereby remove the restrictions"; that is, respondents assert that the approval was the act which removed the restrictions, but that, even so, such removal of restrictions was not sufficient to give validity to the gift, because of the mental incompetency of Barnett. Respondents stated:

> The Court directed a return of fund to the Secretary, not because the restrictions had not been removed, but because the court thought it best to reimpose the restrictions which the Secretary had removed.

The Government disagrees wholly with this argument. The Secretary did a single act, to-wit, approved the gift as set forth in the gift instruments. Since the gift instruments were without legal substance because of Barnett's lack of mentality, the Secretary's approval, so-called, was a futile act. This act, the court below said, was void. If this act was void, how could it operate as a valid release of restrictions? The property belonged to Barnett. The only thing which legally kept Barnett from full possession of it, were the restrictions imposed upon it. If the Secretary validly released such restrictions, then the fund was free and Barnett was entitled to immediate possession of it. No other power save Congress could reimpose the restrictions thus lawfully released. But the court returned the fund to the Secretary, and as the Secretary could not hold any funds except restricted funds, the court's return of the fund to the Secretary stands as a conclusive decision that the restrictions had not been removed by the Secretary.

As the District Court said in its opinion (21 F. (2d) 332), "the property * * * should not have been removed from the custody of the Secretary of the Interior, under the circumstances then presented to him." The circumstances presented to the Secretary were the gift agreements, and the invalidity of such agreements made the removal of the fund from the custody of the Secretary wrongful, just as the District Court held. How then can it be contended that a wrongful loss of possession may follow a valid release

of restrictions which release of restrictions is asserted to have been effected by an act which the court has found to be void? And how can the Secretary again receive possession of a fund after he has validly released restrictions? It must be remembered there was but one act, and that was the act of the Secretary approving the gifts. This act the court below has held to be void, and if void, it is void in all of its manifestations. It is a nullity. It confers no authority, and it affords no protection, and it does not alter relations previously existing. The situation of all parties concerned remained the same as before the void act was executed. *Allen* v. *City of Davenport*, 132 Fed. 209, 216; *Cumberland Tel. & Tel. Co.* v. *City of Evansville*, 127 Fed. 187, 197; *Hopkins* v. *Clemson College*, 221 U. S. 636, 644; *Russell* v. *First Nat. Bank*, 56 So. 868, 871 (Ala.); *40 Cyc.* 214.

Under the previous situation the fund was a restricted fund. Therefore, it seems to us it remained a restricted fund after the invalid act of the Secretary. Any attempt to divide the Secretary's act into two acts, one the release of restriction, and the other the approval of the gift, must fail, since there was but a *single* act, which, if void, fails in all its relations and manifestations. *Heckman* v. *United States*, *supra*.

The particular property physically transferred by the Secretary of the Interior to The Equitable Trust Company consisted of Government bonds which had been purchased by the United States with the money constituting the estate of Jackson Barnett, which the Government was administering. It makes no dif-

ference whether the bonds themselves belonged to the estate of Barnett, or whether the bonds represented the security medium through and in which the Government was holding Barnett's property. In either aspect they constituted a trust fund, the exclusive administration of which lay in the United States, and with which administration no person or court could interfere to the slightest extent.

We have said that the action of the courts below is defended upon the theory that a court of equity has the power to pay the expenses of the recovery of a fund out of the fund itself. It is submitted that such a rule is without application here. The administration of this fund was exclusively in the hands of the United States.

All the court below had to decide was whether the act asserted to have removed restrictions was valid, and if not, who was entitled to the possession of the fund. The court had no authority whatsoever to administer the fund or to disburse it. Any act of the court in the administration of the fund, or the trust upon which it was based, or for the purpose of disbursing any part of the fund, was a direct interference with the governmental policy of the United States in the administration of the Indian funds in its legal possession, whether or not it had actual possession. See *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 568; *In re Heff*, 197 U. S. 488; *Tiger* v. *Western Investment Co.*, *supra*; *Heckman* v. *United States*, *supra*.

It is the fact that this fund is a restricted trust fund, created in the exercise of the governmental policies of the United States, under the decisions of this Court, that differentiates this fund, and everything pertaining to it, from the ordinary private fund with which courts of equity are accustomed to deal, and it is the failure of the courts below to appreciate this distinction which has given rise to rulings made with respect to payments, under authority of the court, out of such fund, which we submit are erroneous.

The decision of the District Court plainly implied that it was of the opinion that the fund was a restricted fund, because the trial court unhesitatingly held that the act of the Secretary of the Interior was void, and that the fund must go back to the Secretary of the Interior. (R. 84.) When it is fully understood, as this Court has pointed out, that only Congress can impose restrictions on Indian properties, and only Congress, or the particular official authorized by Congress, can remove such restrictions, and that restrictions once removed may not be reimposed by any power other than Congress, we submit that it must follow that the decision of the District Judge, holding that the act asserted to be a consent to the release of restrictions was void and that the fund must physically go back to the Secretary of the Interior, definitely establishes that it goes back as a *restricted* fund, and that there never was any removal of restrictions, *at any time.*

The Circuit Court of Appeals seemingly recognized that the existence of a restricted condition of the fund was a bar to any invasion of the fund by the court. It therefore based its decision upon a theory of a sort of "moratorium" on restrictions; that is, when the Secretary lost physical possession of the fund through a void act, that act nevertheless in some way "temporarily removed" restrictions, and that during such temporary lapse the court might control this trust fund.

It said (page 179) that "it was not clear that Barnett did not actually mean to convey, and, if he did, his gift was not void, but must be set aside because of his personal incapacity."

But the decision of the District Court on this question was the law of the case, the appeal upon the merits having been dismissed. And the District Court held explicitly (R. 94–95) that "the gifts which purport to have been made by Barnett cannot be regarded as his acts and deeds, and must be held to be void and of no effect;" that "while he is not insane and is not an idiot, his intelligence is so stunted and undeveloped that he lacked the capacity to know what he was doing," and that in consequence of this "there was nothing upon which the approval of the Secretary could operate, and his acts in the premises were a nullity."

We therefore submit that when the Circuit Court of Appeals said (34 F. (2d) 916, 918), "when, therefore, Barnett with the Secretary's *consent gave* the securities to the Mission," it proceeded upon an

erroneous assumption, because Barnett, being mentally incompetent, could "give" nothing, and since the Secretary's act was void, it did not amount, under any theory of the law, to a "consent;" and that when that court then proceeded to state "the funds passed to its hands unrestricted and as free funds," the court again erred, because no rights, and no change in rights, can be effectuated by a void act, and therefore a fund, which, *before* a void act, was restricted, must necessarily remain a restricted fund, *after* the void act, and, instead of the fund becoming a "free fund," it must still remain a restricted fund which the United States, and the United States alone, was authorized to administer or disburse. With respect to the court's statement that "only a court could undo the transaction so taking place," we submit that all the court could do, in view of the fact that the administration of the fund was a part of the governmental policy of the United States, and the physical fund was illegally at large, was to order the fund returned to the United States.

The court states that it could see no reason why "the court's wings were clipped by restrictions which the Secretary had lawfully, if improvidently, removed." We submit that it may not be said that there has been a "lawful removal of restrictions" when it is law of the case that the very act asserted to have been a removal of restrictions was void. That act being void, and there being but a single act, the restrictions remained unaffected by the void act. And thus, we insist the court's wings were "clipped by

restrictions" imposed by Congress in the beneficient exercise of its governmental policies.

Likewise the assumption of the court, that a third person might intervene "and secure a determination of his claim," with respect to this fund, is inadmissible because, as we have pointed out heretofore, every person must be held to have full knowledge, at all times, that the fund here involved was a governmental fund, being administered by the United States, and that the claims of all persons must be held to have been subject to the Government's right to the possession and administration of this fund.

The Government therefore contends that the decision of the court below constituted an interference with the administration of this trust fund by the United States, that it depleted the trust fund itself, and that the courts below were without jurisdiction to administer the fund, pay attorneys' fees out of it, or indeed to do anything but to order it returned to the physical custody of the Secretary of the Interior.

While the case was pending in the court below, before trial, an application was made by these respondents for an order for the payment of $3,000 for expenses, out of the fund in question. This motion was pending when the United States intervened, but the attorneys for the United States offered no objection to the order. Respondents insist that the granting of this order by the court below rendered the whole subject of the *right* of the

court to make payment out of the fund in question, *res judicata*, and "the law of the case." The order was in our view an invalid order, but we do not think it can possibly have any binding effect save and except with respect to the $3,000 directly involved. In a companion case, *United States* v. *Riggs National Bank*, in the Supreme Court of the District of Columbia, the trial court refused, because of lack of power, to make a similar order for similar expense under a similar application. (R. 103, Fol. 213.)

Whether the United States was right or wrong in not objecting to such proposed order can not have any effect upon the right of the United States to object to a payment for a different purpose (attorneys fees) in an immensely greater amount, made under another and entirely different order, and after the court had ordered the fund returned to the secretary, as a still restricted fund. Whatever may have been the reason for the attitude of the attorneys for the Government with respect to that order, nothing in connection with that order should be held controlling on the right of the United States to attack the other, later, and different, order herein involved.

It is suggested that the contention thus urged by the Government in resisting the invasion of this fund to pay these attorneys, is both harsh and unfair. Even if that were so, it should not militate against the strict protection of the laws with which Congress has surrounded Indian trust funds. In the *Heckman case*, *supra* (p. 446), the Court declined to recognize any right in *bona fide* purchasers of restricted Indian

lands, to a recovery of the consideration paid as a condition precedent to voiding such transfers. The point is that all parties are presumed to know—and particularly these respondents who were lawyers—that such Indian funds are restricted funds, and that no person may rightfully expect to be reimbursed for either property or services out of such fund, save and except under circumstances, and in a manner, authorized by the Acts of Congress.

But may these respondents fairly claim that the contention of the Government presents either a harsh or an unfair result so far as they are concerned? All of these attorneys entered into this litigation under contingent-fee contracts, under which they agreed to take care of the expenses of the litigation, and in connection with which they freely testified they understood they were to get nothing until the fund had been recovered for their client, Bailey. They alleged in their pleading (see par. 26, R. 10) that the United States was not entitled to the possession of this fund, and the prayer of their complaint (R. 12–13) was in that respect adverse to the contention of the United States in the prayer of its amended petition in intervention (R. 63, 82) that the fund should be returned to the Secretary of the Interior. These propositions will be hereafter discussed in this brief.

Surely these respondents must be held to have fully appreciated the significance of their contingent-fee contracts, and that such contingent-fee contracts could not possibly be satisfied out of *restricted*

Indian funds, the right to possession of which was in the United States. Is the position of the respondents, therefore, any different than that of attorneys in any ordinary case where the attorneys are unable for one reason or another to perform the conditions of contingent-fee contracts? The result is one which these respondents, being attorneys, must be held to have contemplated would be the necessary result, if they were unsuccessful in getting the fund into the hands of their client, Bailey, as unrestricted Indian trust funds.

If Barnett's estate, or the United States, has profited by reason of the acts and labors of these respondents, that is a matter for Congress, or possibly the Secretary of the Interior, to consider in connection with the request on the part of these attorneys for ultimate compensation, but, we insist, it is not a matter which the court below was authorized to dispose of.

II

THE RESULT OF THE LITIGATION DID NOT MEET THE CONDITIONS OF RESPONDENTS' CONTINGENT-FEE CONTRACTS

The Government contends further that, regardless of the question of restrictions, and the governmental nature of the fund, the courts below were wrong in allowing attorneys' fees, for the reason that respondents were in the case under contingent-fee contracts which they failed to perform in accordance with their terms.

In the briefs below, respondents vigorously insisted that the return of the fund *to the Secretary*, as a restricted fund, was due to the practically unassisted efforts of respondents. We suggest that the record will not bear out this contention.

There is no allegation in the bill filed by the *prochein ami* in the District Court, indicating any purpose or desire to recover the fund for the United States, to enable it to continue its administration of the Barnett estate. On the contrary the express allegation of the pleading is in part adverse to the right of the United States (R. 10, par. 26), and the prayer demands possession of the fund for Barnett, which really meant Bailey, as guardian. So that plaintiff's complaint does not seem to bear out respondents' contention that they were striving to return the fund to the Secretary.

At this point the nature of the intervention of the United States, as disclosed by its amended pleading, should be noticed. (R. 63–82.) The point is made that in its first pleading the Government seemed to consent to the payment of expenses out of the fund. (R. 51.) But an amended petition was filed correcting this matter. (R. 63–82.) Like the allegations of the Bailey complaint, the United States, too, contended that Barnett was mentally incompetent (R. 64, par. 2), and that the Secretary of the Interior had no power to deliver the bonds in question to the Trust Company (par. 13), and that his act in so doing was void. Up to this point, both Bailey and the United States were making identical contentions. Further

than this, however, Bailey's pleading and the Government's complaint in intervention diverge, and whereas the Bailey pleading alleged that the United States had *no* right to possession of the Barnett estate (par. 26), the Government's complaint in intervention insisted that it had the *sole and exclusive right* to the possession of that estate (R. 81, par. 21); whereas the Bailey complaint alleged that Barnett (Bailey being guardian) was entitled to the possession of the bonds in question, the Government's complaint alleged that the *United States*, through the Secretary of the Interior, was the sole party entitled to the possession of those bonds; and whereas the Bailey complaint in its prayer asks to have the bonds delivered to Barnett (an incompetent), the Government's complaint in intervention asks to have the bonds delivered to the *Secretary of the Interior*, in accordance with the controlling Acts of Congress (R. 82).

It will, therefore, be seen that the entire theory of recovery on the part of Bailey was essentially different from, and opposed to, the theory of recovery advanced by the Government. Under the one theory, the bonds would come to Bailey. Coming to Barnett, by delivery to Bailey, under the contingent-fee contracts, the attorneys would be paid under those contracts. Under the Government's theory, the bonds must be delivered to the Secretary of the Interior, remaining in all respects subject to the restrictions imposed by Congress, which restrictions, it must be conclusively presumed—in view of the invalidity of the act of the Secretary of the

Interior, and in view of the governmental policy involved—had not for one instant been modified, changed, or removed.

It therefore follows that when the courts below found that the United States was entitled to possession of the fund and ordered it returned to the Secretary, the purpose of these respondents, as indicated in the bill filed, was, to that extent, defeated. On the Government's side, the prayer of the Government's complaint in intervention was granted.

Therefore, the Government suggests that these respondents may not properly assert here that the fund was returned to the United States because of their efforts. We see no reason why the Government was not entitled to take advantage of the evidence and labors of these respondents in so far as they tended to help the United States. Such a situation occurs in many lawsuits, the point being that the assistance thus given is given because it can not be avoided.

Consequently, the Government contends that the purpose and prayer of plaintiff's bill having failed, these respondents never complied with their contingent-fee-contract obligations, since compensation under such a contract was to be for success and not for the value of services rendered. See *Consaul* v. *Cummings*, 222 U. S. 262, 271.

The Government is familiar with the rule that where attorneys enter into litigation on a contingent-fee contract, and the contract is found invalid or illegal, the attorneys may nevertheless, in proper cases, be entitled to recover a *quantum meruit* for their

services. But this rule has nothing to do with the decision here. The rule referred to only has reference to cases where the attorneys have *actually performed*, to the same extent that performance was necessary and agreed upon under such defective or invalid contingent-fee contracts. It has never been successfully contended that attorneys, under such circumstances, might recover upon a less performance, in fact upon a *nonperformance*, simply because the contingent-fee contract was declared illegal or invalid. So here, the refusal of the courts below to accept the contingent-fee contract, does not authorize the court, under the above rule, to consider a *quantum meruit* payment to these attorneys, because they never accomplished that which they were employed to accomplish.

There may, indeed, be some question whether, since Bailey purports to appear for Barnett as *prochein ami*, which may be deemed a fiduciary relation, the court was justified in taxing attorneys' fees in favor of Bailey in the same action wherein Bailey appears as a representative of Barnett, in view of the general principle that one may not, in the same litigation, be both friendly to, and hostile to, the same incompetent client. See *Huddleston* v. *Perryman & Co.*, 150 Ala. 629. It may further be questioned whether, since any liability existing against Barnett's estate rested in contract, the estate was not entitled to have the question of respondents' performance of the contingent-fee contracts and the attorneys' right to compensation determined in a law action before a jury.

Cf. Cauthen v. *Cauthen*, 76 S. C. 226, 232; *Hobbs* v. *McLean*, 117 U. S. 567, 582; *Wolfe* v. *Lewis*, 19 How. 280.

But, however this may be, the Government contends that respondents may not claim credit for bringing the fund back into the custody of the United States, and, further, may not assert that they have fulfilled the obligation assumed under their contingent fee contracts. The conclusion is, in the view of the Government, that the courts below were not justified in awarding compensation to the respondents under such circumstances.

III

AS TO CERTAIN OF RESPONDENTS' CONTENTIONS

Two contentions made by respondents in the courts below may be here briefly considered.

The first contention was that because the United States came into the case as an intervener, the propriety of the action and the right of Bailey to bring the action must be conceded by the United States under the rule that requires an intervener to accept the case, and its issues, as the intervener finds them. But this Court has held with reference to the right of the United States in connection with litigation concerning the affairs of Indian wards, that it could not "assume any attitude with respect to their interest which would derogate from its complete representation by the United States," since "such action necessarily precludes the prosecution * * * of any other suit for a similar purpose relating to the

same property." *Heckman* v. *United States*, *supra*, pp. 445, 446.

As we have seen, plaintiff's action being in effect adverse to the interests of the United States, may be maintained on that basis alone, particularly after intervention by the United States, and the right of Bailey to carry on such action existed until the court disposed of that action by turning the property over to the Secretary. Such was the action which the United States found, upon intervention, and such is the action upon which these respondents must now stand or fall.

The second contention is that, because under the final decree entered by the District Court, the District Court retained jurisdiction for the purpose of considering the question of an allowance of attorneys' fees, it amounted, in effect, to an affirmative decree on the part of the court that it had the right to make such allowances, and, therefore, that since the Government did not appeal from such decree, it may not now attack the right of the court to make such allowances. Probably the statement of the proposition is sufficient to dispose of it.

The time to ask for review of the court's order with respect to attorneys' fees was when the order was made, and since the objection on the part of the United States was thereafter promptly made, it was in time.

We have quite generally in this brief referred to Bailey as plaintiff. Of course, in a technical sense,

Barnett was named as plaintiff, Bailey appearing as next friend, claiming to be guardian. But practically, Bailey was in charge of the case, made the contracts with the attorneys, and Barnett, being mentally incompetent, had nothing to do with it. It was Bailey's action, for all practical purposes. Consequently, if the bonds were to be returned in accordance with the prayer of complaint, they would physically go to Bailey, and Barnett would have no more control over them, since he was incompetent and Bailey claimed to be his guardian, than he had when the funds were in the possession of the Secretary.

IV

THE AMOUNT ALLOWED FOR COUNSEL FEES IS EXCESSIVE AND BEYOND THE FAIR AND REASONABLE VALUE OF THE SERVICES RENDERED

Passing the contentions heretofore made, the Government further contends that the attorneys' fees herein allowed are excessive. Eliminating the Oklahoma proceedings, which the Circuit Court of Appeals also eliminated, it seems to us that the case presents a comparatively simple aspect.

Only a single issue of fact was really relevant to the issues, and that issue of fact was the question as to the mental competence of Barnett. Indeed, under the decision of the Circuit Court of Appeals for the Tenth Circuit, in a companion case brought by the United States to recover a portion of these same restricted funds which had come into the hands of a man named Mott, the court held that the question of

even the mental competence of Barnett was irrelevant and unnecessary for the Government to establish since the governing statute was held to forbid any release of restriction for a purpose not for the benefit of Barnett. (See *United States* v. *Mott*, 37 F.(2d) 860.

Be that as it may, in the case at bar, this one issue of fact was determined chiefly, not through the assistance of evidence procured by these attorneys, but through the act of the court itself in calling Barnett to the witness stand, and examining him personally, after these respondent attorneys had neglected to call him as a witness. (R. 91.) So that this single issue of fact was determined by the court without the assistance of anyone except the court itself.

The single issue of law involved in the case was whether or not the act of the Secretary of the Interior was or was not void, and the determination of this question involved simply the statutes defining the power of the Secretary, considered in the light of the decisions of this Court. No other question of law legitimately appeared in the case, and none was pertinently presented.

Under such a situation, granting to counsel the utmost diligence, and permitting them to exercise the utmost care in the consideration and presentation of this single issue of fact and this single issue of law, the Government is unable to understand how it can reasonably be asserted that such services were worth approximately $100,000.

Moreover, with respect to three of the attorneys, Cochran, McCrory and Monk, an additional contingent-fee contract was presented to the court, by which the attorneys purported to protect the interests of the ultimate heirs of Jackson Barnett. How much of the services these particular attorneys should be compensated for in this present litigation, as distinguished from their efforts to build up a fund that might be successfully pursued after the demise of Barnett, seems difficult to apportion.

The Government therefore contends that the fees allowed are exorbitant and unreasonable and should be reduced by this Court—if the Court ever reaches that point in this case—to what this Court shall find to be a figure properly proportionate to the comparatively simple nature of the relevant litigation itself.

CONCLUSION

In conclusion, therefore, the United States, for all of the reasons heretofore urged, submits that the decision of the Circuit Court of Appeals should be reversed.

It seems to us that it would be a reversal of the frequently-asserted policy of the Government, as defined in the decisions of this Court, to permit the trust funds of its helpless Indian wards to be lost, either wholly or in part, through, or as a result of, any improper, wrongful, or illegal act, either voluntary or involuntary, on the part of the officer of the United States to whom the Government had delegated the performance of its own sovereign functions, and the Government makes the foregoing contentions

for the purpose of "enforcing, by appropriate means, the restrictions designed for the security of the Indians."

Respectfully submitted.

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CHARLES ELMORE

No. 21

In the Supreme Court of the United States

October Term, 1929.

UNITED STATES OF AMERICA, *Petitioner,*

vs.

THE EQUITABLE TRUST COMPANY OF NEW YORK, *ET AL., Respondents.*

SUGGESTION OF DIMINUTION OF RECORD AND MOTION FOR *CERTIORARI* TO CORRECT SAME.

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New York, N. Y.,
RAYBURN L. FOSTER,
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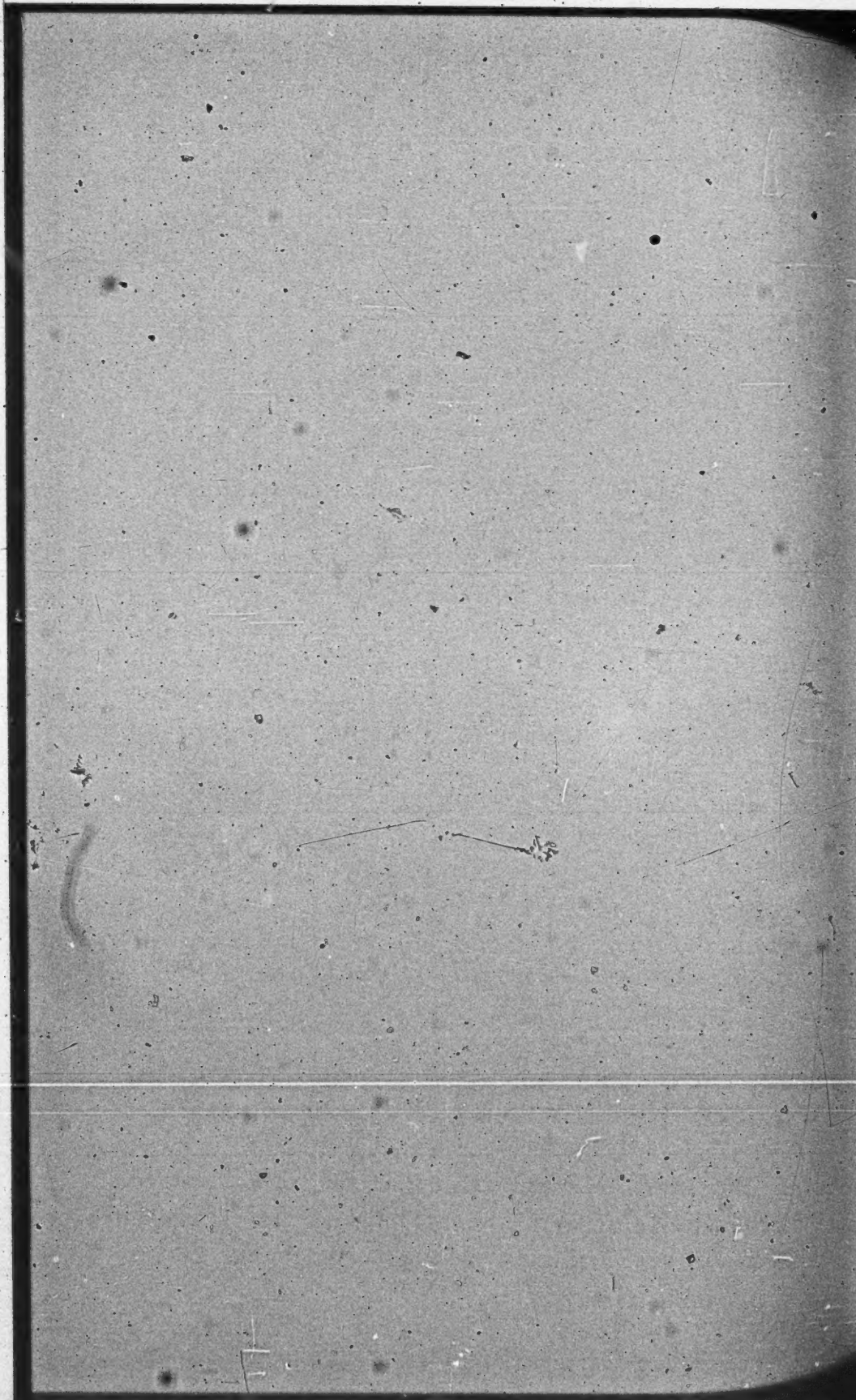
Counsel for all Respondents Other Than The Equitable Trust Company and Murray, Aldrich & Roberts.



IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1929.

No. 530

UNITED STATES OF AMERICA, *Petitioner,*

vs.

THE EQUITABLE TRUST COMPANY OF NEW YORK; MURRAY, ALDRICH & ROBERTS; EDWARD J. PATTERSON; J. FREDERICK EAGLE; WILLIAM GREENOUGH; SHERMAN DAY; CARROLL G. WALTER AND DODGE L. MARKS, COMPOSING THE FIRM OF PATTERSON, EAGLE, GREENOUGH & DAY; RAYBURN L. FOSTER AND R. B. F. HUMMER, COMPOSING THE FIRM OF HUMMER & FOSTER; ALMOND D. COCHRAN, SURVIVING PARTNER OF THE FIRM OF COCHRAN & ELLISON; C. B. McCRORY AND DUDLEY C. MONK, COPARTNERS COMPOSING THE FIRM OF McCRORY & MONK; AND ELMER S. BAILEY, INDIVIDUALLY AND AS *PROCHEIN AMI* OF JACKSON BARNETT,

Respondents.

SUGGESTION OF DIMINUTION OF RECORD AND MOTION FOR *CERTIORARI* TO CORRECT SAME.

Now come the undersigned respondents and respectfully suggest that there is a diminution of the record filed in the above entitled cause, and, pursuant to Rule 17, they

respectfully move that this honorable court issue its writ of *certiorari* directed to the Circuit Court of Appeals for the Second Circuit commanding that court to certify and send to this court certain papers which are of record in that court in this cause.

The papers omitted are of two distinct classes: *(a)* The depositions, testimony, exhibits and briefs which were submitted to and filed in the District Court but not actually printed for use in the Circuit Court of Appeals (R. 359-367); and *(b)* certain of the proceedings had in the Circuit Court of Appeals itself.

The omission of the papers of the first-mentioned class is deemed by these respondents to be a fatal objection to the granting of petitioner's application for a review of the decision of the Circuit Court of Appeals and is relied upon by them as such (see their brief in opposition to petitioner's application for writ of *certiorari*).

The papers of the second-mentioned class are material upon the question of the timeliness of petitioner's application, and their certification here is now requested for that reason. Those papers are:

1. The judges' indorsement upon the original petition for rehearing filed by these respondents in said cause showing the denial of said petition on September 7, 1929, and the indorsement showing the filing thereof in the office of the clerk of the Circuit Court of Appeals on September 11, 1929.

2. The entry made upon the docket of the Circuit Court of Appeals on September 11, 1929, reading "Petition for rehearing denied."

3. The entry upon the docket of the Circuit Court of Appeals, or other record, showing that the mandate of said court was issued to the District Court for the Southern District of New York on September 11, 1929.

The reasons for the presentation of this motion are as follows:

Petitioner's petition for a writ of *certiorari* to review the decision of the Circuit Court of Appeals was not filed in this court until December 18, 1929. The record accompanying said petition makes it appear that respondents' petition for rehearing was denied by the Circuit Court of Appeals on September 18, 1929 (R. 384). The petition for rehearing in fact bears an indorsement "Petition denied, T. W. S., A. N. H., September 7, 1929" (those being the initials of two of the judges of the Circuit Court of Appeals who sat in the case), and under that indorsement there is a stamp affixed by the clerk of the Circuit Court of Appeals which reads, "United States Circuit Court of Appeals, Filed September 11, 1929." There is also an entry upon the docket of the Circuit Court of Appeals made on September 11, 1929, reading "Petition for rehearing denied." The mandate of the Circuit Court of Appeals was thereupon issued to the District Court of the United States for the Southern District of New York on September 11, 1929, and said mandate was actually received and filed in said District Court on September 11, 1929. The clerk of the Circuit Court of Appeals notified counsel for respondents that the petition for rehearing had been denied on September 11, 1929, and the clerk of the District Court also notified counsel for re-

spondents that the mandate had been received and filed by him on September 11, 1929. Counsel for petitioner, *viz.*, the United States Attorney for the Southern District of New York, likewise had such notice and actually conferred with counsel for respondents with respect to the form of the decree to be entered by the District Court upon the mandate prior to September 18, 1929.

Respondents, therefore, desire to oppose petitioner's petition for *certiorari* upon the ground, among others, that such petition was not filed within the three months provided by the statute (Act February 13, 1925, 43 Stat. 936; U. S. Code, Title 28, Sec. 350) and they desire the record to show the facts above set out in support of that ground of opposition.

Notice of the filing of petitioner's petition for *certiorari* was served upon respondents on December 21, 1929, during the absence of their counsel, and as the time fixed by the rules for the submission of said petition to the court is thus January 13, 1930, there is not sufficient time, since the defect in the record was discovered, to procure a certified transcript of the papers requested for annexation to this motion and print and serve this motion in time for it to be submitted by that date.

Wherefore, the undersigned respondents pray that a *certiorari* to correct diminution of record be issued out of and under the seal of this honorable court directed to the Circuit Court of Appeals for the Second Circuit commanding that court to certify and send to this court the record of

its proceedings in this case hereinabove specifically enumerated.

CARROLL G. WALTER,
New York, N. Y.,
RAYBURN L. FOSTER,
Tulsa, Oklahoma,
ALMOND D. COCHRAN,
Okmulgee, Oklahoma,
Counsel for All Respondents Other Than The Equitable Trust Company and Murray, Aldrich & Roberts.

State of Oklahoma, County of Tulsa—ss.

I, Carroll G. Walter, one of the counsel for all respondents other than The Equitable Trust Company and Murray, Aldrich & Roberts, do solemnly swear that the facts recited in the foregoing "Suggestion of Diminution of Record and Motion for *Certiorari* to Correct Same" are true of my own knowledge, except the facts with respect to the indorsements upon the original petition for rehearing and the docket entries of the Circuit Court of Appeals, and those facts I believe to be true. The source of my information and the ground of my belief as to those facts is a report made to me by one of the attorneys employed in my office in New York whom I instructed to examine the records of the Circuit Court of Appeals. Said report states the facts as set forth in the foregoing motion, and the reason why the

affidavit of that attorney is not submitted, is, that to await either its arrival from New York or my return to New York would cause such delay as to unduly shorten the notice of this motion.

CARROLL G. WALTER.

Subscribed and sworn to before me this 3rd day of January, 1930.

JULIA JONES,
Notary Public.

My commission expires August 29, 1931.

FILE COPY

Office Supreme Court, U.
FILED
JAN 8 1930
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1929

No. 21

UNITED STATES OF AMERICA,
Petitioner,

v.

THE EQUITABLE TRUST COMPANY OF NEW YORK, and others,
Respondents.

APPENDIX

To Motion for Certiorari to Correct Diminution of Record

CARROLL G. WALTER, New York, N. Y.
RAYBURN L. FOSTER, Tulsa, Okla.
ALMOND D. COCHRAN, Okmulgee, Okla.
Counsel for all Respondents other than Equitable Trust Co. and Murray, Aldrich & Roberts.

Supreme Court of the United States

OCTOBER TERM—1929.

UNITED STATES OF AMERICA,
Petitioner,

vs.

THE EQUITABLE TRUST COMPANY OF NEW YORK; MURRAY, ALDRICH & ROBERTS; EDWARD J. PATTERSON; J. FREDERICK EAGLE; WILLIAM GREENOUGH; SHERMAN DAY; CARROLL G. WALTER and DODGE L. MARKS, composing the firm of PATTERSON, EAGLE, GREENOUGH & DAY; RAYBURN L. FOSTER and R. B. F. HUMMER, composing the firm of HUMMER & FOSTER; ALMOND D. COCHRAN, surviving partner of the firm of COCHRAN & ELLISON; C. B. MCCRORY and DUDLEY C. MONK, co-partners composing the firm of MCCRORY & MONK; and ELMER S. BAILEY, individually and as *prochein ami* of JACKSON BARNETT,
Respondents.

No. 530.

APPENDIX

To Motion for Certiorari to Correct Diminution of Record.

Now COME the undersigned respondents and respectfully present, as an appendix to the suggestion of diminu-

tion of record and motion for certiorari to correct same which they have heretofore filed herein, the attached certified transcript of the proceedings in the Circuit Court of Appeals in this case which are omitted from the record filed by petitioner herein.

Respectfully submitted,

CARROLL G. WALTER,
New York, N. Y.

RAYBURN L. FOSTER,
Tulsa, Oklahoma.

ALMOND D. COCHRAN,
Okmulgee, Oklahoma.

Counsel for all Respondents other than The Equitable Trust Company and Murray, Aldrich & Roberts.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Second Circuit.

Jackson Barnett, a mental incompetent, by Elmer S. Bailey, his *prochein ami*,

Plaintiff,

against

The Equitable Trust Company of New York and The American Baptist Home Mission Society,

Defendants,

United States of America,

Intervenor,

The Equitable Trust Company of New York, Murray, Aldrich & Roberts; Edward J. Patterson, J. Frederick Eagle, Wm. Greenough, Sherman Day, Carroll G. Walter, and Dodge L. Marks, composing the firm of Patterson, Eagle, Greenough & Day; Rayburn L. Foster and R. B. F. Hummer, composing the firm of Hummer & Foster; Almond D. Cochran, surviving partner of the firm of Cochran & Ellison; C. B. McCrory and Dudley C. Monk, co-partners composing the firm of McCrory & Monk; and Elmer S. Bailey, individually and as *prochein ami* of Jackson Barnett,

Appellees,

against

United States of America,

Appellant.

I, William Parkin, Clerk of the United States Court of Appeals, Second Circuit, do hereby certify that the follow-

ing is a full and true copy of the decision of this Court endorsed on the original petition for a rehearing of the above entitled case, on file in this office, and of the filing stamp affixed at the time of filing said decision:

Petition denied.

T. W. S.
A. N. H.

September 7, 1929.

UNITED STATES CIRCUIT COURT OF APPEALS
Filed September 11, 1929
WILLIAM PARKIN, *Clerk*,
Second Circuit.

Dated January 4, 1930.

WM. PARKIN,
Clerk.

(SEAL OF U. S. CIRCUIT COURT OF APPEALS)

UNITED STATES CIRCUIT COURT OF APPEALS,

Second Circuit.

I, WILLIAM PARKIN, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify the following to be true copies of the docket entries in the case entitled

JACKSON BARNETT, by ELMER S. BAILEY, his *prochein ami*, *Plaintiff*,

vs.

EQUITABLE TRUST COMPANY OF NEW YORK, *et al.*, *Defendants*,

UNITED STATES, *Appellant*,

as the same remain of record and on file in my office.

March	8, 1929	Filed Record
	8	Filed 24 copies record
	9	Filed order as to record
	13	Filed motion to dismiss
April	15	Filed brief appellee
	30	Filed motion to dismiss
May	6	Motion denied
	6	Filed motion papers
	13	Filed brief appellant
	13	Filed order denying motion
	20	Filed brief appellee, reply
July	15	Decree modified, L. HAND, *C. J.*
	22	Filed order for mandate
	22	Filed order extending time
Aug.	12	Filed petition for rehearing

Sept.	11	Petition denied (Endsd.)
	11	Issued mandate
	19	Filed order denying petition
Nov.	29	Certified record to Solr. General.

Dated, New York, January 6, 1930.

WM. PARKIN,
Clerk.

(SEAL OF U. S. CIRCUIT COURT OF APPEALS)

UNITED STATES CIRCUIT COURT OF APPEALS

For the Second Circuit.

JACKSON BARNETT, a mental incompetent, by ELMER S. BAILEY, his *prochein ami*,

Plaintiff,

against

THE EQUITABLE TRUST COMPANY OF NEW YORK and THE AMERICAN BAPTIST HOME MISSION SOCIETY,

Defendants,

UNITED STATES OF AMERICA,

Intervenor,

THE EQUITABLE TRUST COMPANY OF NEW YORK, MURRAY, ALDRICH & ROBERTS; EDWARD J. PATTERSON, J. FREDERICK EAGLE, WM. GREENOUGH, SHERMAN DAY, CARROLL G. WALTER, and DODGE L. MARKS, composing the firm of PATTERSON, EAGLE, GREENOUGH & DAY; RAYBURN L. FOSTER and R. B. F. HUMMER, composing the firm of HUMMER & FOSTER; ALMOND D. COCHRAN, surviving partner of the firm of COCHRAN & ELLISON; C. B. MCCRORY and DUDLEY C. MONK, co-partners composing the firm of MCCRORY & MONK; and ELMER S. BAILEY, individually and as *prochein ami* of Jackson Barnett,

Appellees,

against

UNITED STATES OF AMERICA,

Appellant.

The above entitled cause coming on further to be heard, and it appearing that the opinion of this Court was filed in

the Clerk's Office on Monday, July 15, 1929, now, on motion of PATTERSON, EAGLE, GREENOUGH & DAY, it is

ORDERED that the time of the firm of PATTERSON, EAGLE, GREENOUGH & DAY, the firm of HUMMER & FOSTER, ALMOND D. COCHRAN, and the firm of MCCRORY & MONK to file a petition for rehearing herein be and it hereby is extended to and including the 15th day of August, 1929; and it is

FURTHER ORDERED that pending the filing of a petition for rehearing within the time herein limited no mandate shall issue.

Dated, July 22, 1929.

THOMAS W. SWAN,
U. S. Circuit Judge.

A true copy,
WM. PARKIN,
Clerk.

(SEAL OF U. S. CIRCUIT COURT OF APPEALS)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929

No. 530

UNITED STATES OF AMERICA, *Petitioner*

v.

THE EQUITABLE TRUST COMPANY OF NEW YORK; Murray, Aldrich & Roberts; Edward J. Patterson; J. Frederick Eagle; William Greenough; Sherman Day; Carroll G. Walter and Dodge L. Marks, Composing the Firm of Patterson, Eagle, Greenough & Day; Rayburn L. Foster and R. B. F. Hummer, Composing the Firm of Hummer & Foster; Almond D. Cochran, Surviving Partner of the Firm of Cochran & Ellison; C. B. McCrory and Dudley C. Monk, Composing the Firm of McCrory & Monk; and Elmer S. Bailey, Individually and as *Prochein Ami* of Jackson Barnett.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE EQUITABLE TRUST COMPANY OF NEW YORK AND MURRAY, ALDRICH & ROBERTS

First, on behalf of Murray, Aldrich & Roberts, who were the attorneys for The Equitable Trust Company of New York before the District Court and the Cir-

cuit Court of Appeals, it should be said that they were granted no allowance on account of their services as attorneys or otherwise, and have not received a cent out of the fund in litigation or otherwise.

Second, on behalf of The Equitable Trust Company of New York it should be said that after the entry of the judgment of the Circuit Court of Appeals on July 22, 1929, and after the decree of the District Court was entered upon the mandate of the Circuit Court of Appeals on the 19th day of September 1929, The Equitable Trust Company of New York endeavored to comply with said judgment and decree by turning over the fund in its hands less the amounts required to be paid to the attorneys and the *prochein ami*, but the Office of the Secretary of the Interior advised it that the Secretary of the Interior was not prepared to accept delivery thereof at that time. At the same time and on or about September 27, 1929 it paid to the attorneys and to the *prochein ami* the amounts required to be paid to them by said judgment and decree. Before doing so, the attorneys for The Equitable Trust Company of New York advised the Assistant United States District Attorney in charge of the case that these payments were about to be made, and no objection was offered and no intimation given that an application for certiorari would be made. No stay of execution or supersedeas was applied for or obtained either from the Circuit Court of Appeals or from a Justice of this Court before certiorari was granted. Therefore, if this Court should hold that the payments to the attorneys and the *prochein ami*

were improper or excessive, the mandate should direct that the attorneys and the *prochein ami* to whom payment was made as aforesaid should refund the same to the Secretary of the Interior.

Respectfully submitted,

HARRISON TWEED,
Counsel for The Equitable Trust Company of New York and Murray, Aldrich & Roberts.

FILE COPY

JAN 10 1930

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1929

No. 21

UNITED STATES OF AMERICA,

Petitioner,

vs.

THE EQUITABLE TRUST COMPANY OF NEW YORK; MURRAY, ALDRICH & ROBERTS; EDWARD J. PATTERSON; J. FREDERICK EAGLE; WILLIAM GREENOUGH; SHERMAN DAY; CARROLL G. WALTER and DODGE L. MARKS, composing the firm of PATTERSON, EAGLE, GREENOUGH & DAY; RAYBURN L. FOSTER and R. B. F. HUMMER, composing the firm of HUMMER & FOSTER; ALMOND D. COCHRAN, surviving partner of the firm of COCHRAN & ELLISON; C. B. McCRORY and DUDLEY C. MONK, co-partners composing the firm of McCRORY & MONK; and ELMER S. BAILEY, individually and as *prochein ami* of JACKSON BARNETT,

Respondents.

BRIEF FOR RESPONDENTS
In Opposition to Petition for Writ of Certiorari

CARROLL G. WALTER, New York, N. Y.
RAYBURN L. FOSTER, Tulsa, Okla.
ALMOND D. COCHRAN, Okmulgee, Okla.
Counsel for all Respondents other than The Equitable Trust Co. and Murray, Aldrich & Roberts.

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Supreme Court of the United States

OCTOBER TERM, 1929.

UNITED STATES OF AMERICA,
Petitioner,

vs.

THE EQUITABLE TRUST COMPANY OF NEW YORK; MURRAY, ALDRICH & ROBERTS; EDWARD J. PATTERSON; J. FREDERICK EAGLE; WILLIAM GREENOUGH; SHERMAN DAY; CARROLL G. WALTER and DODGE L. MARKS, composing the firm of Patterson, Eagle, Greenough & Day; RAYBURN L. FOSTER and R. B. F. HUMMER, composing the firm of Hummer & Foster; ALMOND D. COCHRAN, surviving partner of the firm of Cochran & Ellison; C. B. MCCRORY and DUDLEY C. MONK, copartners composing the firm of McCrory & Monk; and ELMER S. BAILEY, individually and as *prochein ami* of Jackson Barnett,
Respondents.

No. 530.

BRIEF FOR RESPONDENTS.

In Opposition to Petition for Writ of Certiorari.

Petitioner did not apply for any stay and the allowances now complained of were actually paid in September 1929, before there was any intimation that a certiorari would be sought. While that may not technically estop petitioner, we think it is a fact to be taken into consideration.

Petitioner's statement of the case is incomplete and to some extent inaccurate, but there are several preliminary objections to be noted before we set forth our correcting statement (*infra*, pp. 8-13).

I.

The petition was not filed in time.

1. Taken literally, the petition prays a review of a judgment entered September 18, 1929 (Pet. p. 2), which, upon inspection (R. 384), appears to be nothing but an order denying a petition for rehearing. Such an order is not reviewable (*Wyle* v. *Coxe*, 14 How. 1), and, moreover, petitioner is not aggrieved by it.

Construing the petition as intending to ask for a review of the judgment made by the Circuit Court of Appeals upon the merits, the petition was *filed too late*, because that judgment was entered in July, 1929 (R. 372, 377, 378) and this petition was not filed until December 18, 1929.

It is true that these respondents petitioned for a rehearing, asking that their allowance be increased (R. 378-383), but the rule that the filing of a petition for rehearing "suspends the running of the time for taking a writ of error or an appeal" (*Morse* v. *United States*, 270 U. S. 151, 153) is not applicable, we submit, inasmuch as *petitioner* did *not* seek a rehearing. Respondents' petition for rehearing could not have affected the questions which petitioner here seeks to present; and we have discovered no case which holds that the filing of a petition for rehearing by one party operates to extend the time of the *opposite* party for asking a review. The judgment entered in July, 1929, was final and reviewable when rendered,

despite the right to seek a rehearing (*Wyle* v. *Coxe*, 14 How. 1; *Southern Ry. Co.* v. *Clift*, 260 U. S. 316, 318, 319), and the filing of the petition for rehearing extended *only the time of the parties who filed it.*

This would seem especially true inasmuch as respondents' petition for rehearing was not filed within the time provided by the rules of the Circuit Court of Appeals, and the order which gave respondents additional time did not extend petitioner's time (See order at pp. 7, 8 of Appendix to Respondents' Motion for Certiorari to Correct Diminution of Record).

2. Assuming, however, that respondents' petition for rehearing extended petitioner's time for initiating proceedings for review, the present petition is still too late because, under that view, "the time within which the proceeding to review must be initiated begins from *the date of the denial*" of the petition for rehearing (*Morse* v. *United States*, 270 U. S. 151, 153, 154), and that date is not later than September 11, 1929.

The record presented by petitioner shows an order denying respondents' petition for rehearing dated September 18 and filed September 19, 1929 (R. 383, 384), but that record is incomplete upon this point and we are herewith submitting a motion, pursuant to Rule 17, to correct that diminution of record. The facts, as disclosed by that motion, are as follows: The original petition for rehearing is endorsed "Petition denied, T. W. S. A. N. H. September 7, 1929"—they being the initials of Judges SWAN and A. N. HAND. That was filed with the Clerk of the Circuit Court of Appeals on September 11, and on that date there was entered upon the docket "Petition denied". Counsel

were notified of the denial of the petition for rehearing *and the mandate was issued to the District Court on September 11.* The mandate was actually received and filed in the District Court on September 11, and on that date the Clerk of the District Court notified counsel of the receipt and filing of the mandate.

Rule 26 of the Circuit Court of Appeals provides:

> "1. A petition for re-hearing may be filed within fifteen days from the filing of the opinion of this court in the clerk's office. It must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be granted or permitted to be argued, unless a judge who concurred in the judgment desires it and a majority of the court so determines.
>
> "2. If a petition for re-hearing be filed within the time herein limited, *no mandate shall issue pending the disposition of said petition.*"

The petition for rehearing was in fact denied when two of the judges made their endorsement to that effect upon the original petition on September 7; but even if that date be disregarded, there certainly can be no doubt that it was denied when the clerk *filed that endorsement and made his docket entry of denial and issued the mandate on September 11.* The three months' limitation thus runs from that date (*Morse* v. *United States,* 270 U. S. 151, 153, 154), and as this petition for certiorari was not filed until December 18, it was out of time and must be denied upon that ground (*Toledo Scale Co.* v. *Computing Scale Co.,* 261 U. S. 399, 418; *Rust Land Co.* v. *Jackson,* 250 U. S. 71, 76).

While the date of the issuance of the mandate is not of itself controlling, the fact that the mandate issued on September 11 is proof that the petition for rehearing had been denied on that date (C. C. A. Rule 26, quoted at p. 4, *supra*).

The subsequent order entered by the Clerk on September 18, appearing at page 384 of the record, accomplished nothing more than already had been accomplished by the docket entry in substantially the same words on September 11. Moreover, that order is a mere nullity, because the mandate already had gone down and the court had lost jurisdiction and then had no power to grant a rehearing even if it desired to do so (*Peck* v. *Sanderson*, 18 Howard 42, and cases there cited).

If the time for filing a petition for certiorari may be kept open by entering successive orders denying a petition for rehearing, after the rehearing has been in fact denied and the mandate issued, it then can be kept open perpetually. Such a construction is inadmissible.

II.

The petition is not properly filed because not accompanied by a certified transcript and printed copies of the record.

This defect is jurisdictional.

The motions which resulted in the decree granting the allowances were made upon "all the pleadings and proceedings heretofore had herein" (R. 206, 208), and the record in the District Court is over 3500 pages, besides approximately 500 pages of printed briefs (R. 228). Only a small part of that record was actually printed for the

Circuit Court of Appeals. Printing of the depositions, testimony, exhibits and briefs (which of course were material, inasmuch as the extent and value of legal services were in issue) was dispensed with by stipulation and order (R. 359-367), which expressly provided, however, that the record on appeal should consist, not only of the matters actually printed, but, also, of "all depositions, testimony, exhibits, briefs and other papers submitted to and filed in the District Court" and that the unprinted matters should be before the Circuit Court of Appeals with the same force and effect as if printed (R. 359-367, particularly folios 1077, 1085, 1090, 1098).

No stipulation or order dispensing with printing was obtained (or asked) with respect to an application to this court for a writ of certiorari, and no resort was had to any of the usual methods of eliminating any matter believed to be immaterial (*Robertson's Supreme Court Practice*, pp. 31, 32). Nevertheless, petitioner has not here accompanied its petition with any part of the record except the comparatively small part which was actually printed in the court below.

Rule 38, subdivision 1, requires that petitions for certiorari "shall be accompanied by a certified transcript of the record in the case, including the proceedings in the court to which the writ is asked to be directed". Subdivision 7 requires that the record be printed. Subdivision 2 provides that the petition will be deemed in time "when it, *the printed record*, and the supporting brief, are filed with the clerk within the period prescribed by Section 8 of the Act of February 13, 1925".

Those provisions clearly contemplate both the filing

and the printing of a *complete* record of the proceedings in both the District Court and Circuit Court of Appeals; and obviously no court can fairly determine the right to an allowance or the extent or value of the services of attorneys in a cause without having the entire record before it.

The statute requires that applications for writs of certiorari be "*duly made* within three months after the entry" of the judgment or decree to be reviewed (Act of February 13, 1925; 43 Stat. 936; U. S. Code, Title 28, Sec. 350); and under the rules of this court such an application is not "duly made" unless the petition *and printed record* are filed with the clerk within that period. Petitioner's failure either to file or to print the entire record is thus a fatal jurisdictional defect.

Minor and inadvertent omissions from a record possibly may be overlooked upon the theory of substantial compliance; but the omission here of all the depositions, testimony, exhibits and briefs is too serious and fundamental to be excused upon that ground.

Petitioner's failure to apply for any stay of proceedings, its failure to take any steps with reference to possible reduction of matter to be printed, and its action in withholding its petition until what it apparently thought was the last day for filing, all indicate that its motive was to keep respondents in ignorance of its purpose to apply for a certiorari in order thereby to preclude respondents from filing a cross-petition asking that the allowances made by the District Court be restored. There is, therefore, no reason why petitioner should not be made to suffer the full penalty for its mistake as to timeliness and its omission to file a complete record.

III.

The question sought to be raised by petitioner does not in truth arise in this case, and petitioner is also precluded from raising it.

The circumstances of this case are unparalleled and amazing (R. 335, 173; and see reported opinions in 21 Fed. (2d) 325; 26 Id. 350; 34 Id. 916). It is not typical of other cases. Neither was it so simple as petitioner, at pp. 4, 5 of its petition, would now have this court believe (See its amended petition of intervention, R. 131-169, and p. 10 of its brief in this court in opposition to Mission Society's application for certiorari, No. 320 of October Term, 1928, 278 U. S. 626).

Jackson Barnett is an aged, full-blood, illiterate, mentally incompetent, Creek Indian, who became wealthy through the discovery of oil upon the 160 acres allotted to him when the tribal lands were allotted in severalty among the members of the tribe. In February, 1920, he was kidnapped by a white woman who carried him off to Kansas and married him (R. 173, 174, 139-143). In December, 1922, by means of a fraudulent conspiracy, he was made to put his thumb-mark upon an instrument (R. 40-43) by which he gave away $1,100,000 Liberty Bonds, representing accumulated royalties from an oil and gas lease of his allotment, which were then held for him by the Secretary of the Interior (R. 174-187; 149-166). One-half was given to the woman who kidnapped him, and the other half was given in trust for The American Baptist Home Mission Society "in an effort to make this transaction palatable" (R. 175). This gift was "approved" by the then Secretary of the Interior, ALBERT B. FALL, February 1, 1923 (R. 155).

Carl J. O'Hornett was then acting as guardian of Barnett under appointment of a court of Oklahoma where Barnett resided (R. 136). O'Hornett endeavored to get Secretary WORK to vacate the approval of the gift, or to cooperate with him in bringing suits for the recovery of the funds. Secretary WORK refused and O'Hornett resigned in June 1924 (R. 22, 23, 233-235). Elmer S. Bailey was then appointed as O'Hornett's successor, and he retained the law firm of Hummer & Foster, of Henryetta, Oklahoma, as his attorneys (R. 233-234). Hummer & Foster then themselves retained the other law firms the members of which are respondents here (R. 236).

The Secretary of the Interior refused to permit any of the funds of Barnett in his hands to be used for the purpose of prosecuting any suit for the recovery of the bonds (R. 237, 238, 287), and that refusal was persisted in even despite a recommendation by a Congressional Committee (R. 238-242).

Until this suit was instituted in January, 1925, by these respondents, no step had been taken by the United States to set aside the gifts, although nearly two years had elapsed and the matter had been repeatedly brought to the attention of both Secretary WORK and the Department of Justice.

As a result of data submitted to the Department of Justice by some of these respondents (R. 237, 238, 287, 288) Attorney-General STONE announced on February 9, 1925, in a letter to Secretary WORK, that he thought the distribution of the $1,100,000 was entirely unauthorized and it was the duty of the Government to use its best efforts to assist in recovering the same (R. 242). That letter was

written in response to a letter from Secretary WORK asking Attorney-General STONE to refuse respondents' request for co-operation and assistance (R. 242). Notwithstanding Attorney-General STONE's letter, the United States took no steps toward recovering the money until November, 1925, when it finally moved to intervene in this case (R. 319, 320; 93-109). In the interim, the United States had taken an attitude which, apparently at least, was hostile to Barnett's case (R. 243-245; 288, 289), and its intervention in this case was brought about only through the persistent efforts of these respondents (R. 254-256; 287-289; 332-337).

Equity Rule 37 expressly provides that an intervention "shall be *in subordination to, and in recognition of, the propriety of the main proceeding*". By its intervention, therefore, the present petitioner expressly conceded the right of Barnett to bring this particular suit; and that carried with it, as a necessary incident, the propriety of Bailey as next friend *and the propriety of the employment of these respondents.* When petitioner intervened, it was the entire executive department, the complete sovereignty, which intervened—the Interior Department as well as the Department of Justice (R. 109), and the Secretary of the Interior as well as the Department of Justice is thus bound by the intervention, with all its implications and consequences, including the propriety of the appearance of these respondents as next friend of and counsel for Barnett.

Furthermore, in its petition of intervention, the United States expressly prayed that the bonds be returned to the Secretary of the Interior *"after deducting the reasonable expenses incident to this litigation"* (R. 102, 320). Thus,

in the very pleading by which petitioner got into court, it expressly recognized and admitted what really was implicit in the fact of intervention, *viz.*, that the expenses of the litigation would first have to be paid out of the fund before it could be returned.

At the time petitioner applied for leave to intervene, there was pending in the District Court a motion by these respondents for an allowance out of the fund for the purpose of defraying the expenses of prosecuting the suit (R. 319, 126-128). Decision upon that motion was withheld at the request of petitioner pending its application for leave to intervene (R. 319, 320, 126), but petitioner did not oppose the granting of the motion (R. 319, 320, 127). On the contrary, it stated it did not wish to oppose (R. 319). The motion *was* opposed, however, by the defendant Mission Society *upon the precise ground now urged by the petitioner upon this application for writ of certiorari, viz.*, that the fund involved is restricted against alienation except by the approval of the Secretary of the Interior.*

Despite that opposition, the application for expense money was granted (R. 126-128) and *no appeal was taken,*

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*Petitioner's failure to bring the entire record to this court makes it impossible for us to give a supporting reference; but under the circumstances we feel justified in here quoting the following from the brief submitted by the Mission Society in opposition to that application:

> "The affidavits upon which this motion is made show that the bonds forming the trust fund here involved were so long as they were in the possession of the Secretary of the Interior, the restricted property of plaintiff who was and is a restricted Indian. If it be assumed (which is, of course, not admitted) that the action of the Secretary of the Interior in turning over plaintiff's bonds to The Equitable Trust Company was illegal, nevertheless the bonds still remained and they, together with the accrued income thereon, are the *restricted property of plaintiff and subject to the sole and exclusive control of the Secretary of the Interior;* and the bonds must be returned and the accrued income thereon must be paid to the Secretary of the Interior; *and this Court has no power to direct any other disposition of the bonds or the accrued income thereon.*"

although the order was in its nature appealable (*Trustees v. Greenough*, 105 U. S. 527).

Respondents, with petitioner's knowledge and acquiescence, relied and acted upon the order by taking voluminous depositions and in all other respects bearing the burden of the prosecution of the case; and both courts below have found as a fact that it was the respondents, not petitioner, who prosecuted the case and brought about the recovery (R. 332-334, 375). They were, moreover, expressly urged to do this and were assured by petitioner that in the event of success they would experience no difficulty in obtaining liberal compensation (R. 329).

The decree entered by the District Court after the trial directs The Equitable Trust Company "*subject to the next succeeding paragraph hereof*" to return the fund to the Secretary of the Interior to be held by him as the property of Jackson Barnett under and pursuant to the acts of Congress relating thereto (R. 197). By the "next succeeding paragraph" of that decree the District Court expressly retained jurisdiction *of the cause and of the property* for the purpose of thereafter entertaining and deciding applications by counsel for allowances out of the property for their services and disbursements, and it also stayed execution of and enjoined compliance with its direction to return the fund to the Secretary until the applications for allowances were finally determined (R. 199). That decree thus, as pointed out by the judge who made it, "clearly implied that fees and expenses in connection with the suit were expected by counsel *and would be allowed by the court*" (R. 334). Yet, petitioner not only did not itself appeal from that decree, but it joined with the

present respondents in asking that the Mission Society's appeal be dismissed and in opposing the Mission Society's application to this court for writ of certiorari (R. 325, 326; and see its brief in this court in No. 320 of October Term 1928, 278 U. S. 626).

After entry of the final decree in the District Court, petitioner expressly consented to three successive orders by which the time for making applications for allowances was extended until after the Mission Society's attempts to review the decree were terminated (R. 200-205).

Not until after all the work was done and the applications for allowances had been actually submitted was there any suggestion that any question as to the right to an allowance could or would be raised.

The order awarding expense money (R. 126-128) and the final decree on the merits (R. 196-199) constitute, we submit, conclusive adjudications of the right and power of the courts below to make allowances out of the fund, and not having been appealed from by petitioner they are binding upon it as *res judicata.*

The precise point was expressly raised and actually decided upon the application for expense money (*supra*, p. 11), and it does not detract from, but rather adds to, the force of that adjudication that petitioner did not then oppose or contest it (*Nashville, etc., R. R. Co.* v. *United States*, 113 U. S. 261; *Masters* v. *City of Rainier*, 238 Fed. 827, 832). That simply shows that petitioner then recognized, and frankly conceded, what it now undertakes to deny. Neither does it detract from the force of the adjudi-

cation that the order awarding expense money related to a different sum of money or demand (*New Orleans* v. *Citizens Bank*, 167 U. S. 371, 396, and cases there cited) and was made upon a motion without a formal joinder of issue (*Spencer* v. *Watkins*, 169 Fed. 379, 385; *Dwight* v. *St. John*, 25 N. Y. 203, 206, 207).

The effect of an adjudication as *res judicata* is not confined in its operation to subsequent independent suits or proceedings, but is equally applicable to all ancillary or collateral proceedings in the same suit (*Freeman on Judgments*, 5th Ed., Section 627-A).

Petitioner could have appealed from so much of the final decree as made the return of the fund to the Secretary subject to the allowances (R. 197, 199), and not having done so it cannot now attack that provision or be heard in opposition to it (See *United States* v. *American Ry. Express Co.*, 265 U. S. 425, 435).

It is also well settled that a party cannot assume successive positions in the course of a suit, or a series of suits in reference to the same facts, which are *inconsistent* with each other. He will be confined to the position he first adopts (*Davis* v. *Wakelee*, 156 U. S. 680, 689, 691; *Daniel* v. *Tearney*, 102 U. S. 415, 421; *Bigelow on Estoppel*, 6th Ed. p. 732). This principle, which thus prevents a party from maintaining inconsistent positions in judicial proceedings, is applicable to petitioner, for the substantial considerations underlying the doctrine of estoppel apply to sovereigns as well as to individuals, at least with respect to their position in judicial proceedings (*United States* v. *Stinson*, 125 Fed. 907, 910, affirmed 197 U. S. 200; *State* v. *Jackson, etc. Co.*, 69 Fed. 116, per Taft, Lurton & Sev-

ERENS, *JJ.*). Furthermore, petitioner is not here asserting sovereign rights. It is here merely asserting the rights of Barnett, a private citizen.

By reason, therefore, of the position taken by petitioner during the entire course of the litigation, extending from the time of its intervention down to the time the applications for allowances were submitted, it is now precluded from taking the position it now takes in this petition.

And by reason of the earlier adjudications herein, in which petitioner acquiesced, the question as to the court's power to make allowances has been conclusively adjudicated and does not in truth arise or now exist as a question to be determined.

IV.

The question raised is not presented by the record, for the additional reason that the funds here were not restricted.

Petitioner states the question to be whether the courts below had power to charge an Indian's *restricted* property with attorneys' fees (Pet. p. 2), and its entire argument proceeds upon the theory that the funds were restricted. That theory is erroneous, and for that reason the question presented is not really involved.

That the fund in question, representing accumulated royalties under a lease of restricted lands, was itself restricted property so long as it remained in the custody and control of the Secretary of the Interior is of course

conceded. That is to say, it was subject to the provision of the Act of May 27, 1908, that it could not be alienated or encumbered prior to April 26, 1931, unless the Secretary of the Interior removed that restriction (35 Stat. 312, quoted at pp. 10, 11, of petition). But the idea that the fund was still "restricted" after the Secretary himself voluntarily and deliberately relinquished his custody thereof and transferred the bonds out of his possession into the possession of the defendants, is so palpably contrary to fact, so repugnant to logic and common sense, and so wholly unsupported by authority, that the contention must be denounced as frivolous.

See opinions below on this point at R. 335 and 374, 375.

A reading of the Act of May 27, 1908 (Pet. pp. 10, 11) will show that the entire jurisdiction and power of the Secretary is limited to two things: He may remove restrictions and he may approve or disapprove leases. The gift here in question was not a lease. Therefore, the Secretary's approval of the gift and surrender of the bonds could not have been anything other than a removal of restrictions. The only reason for submitting the proposed gift to the Secretary was that by approving it and surrendering the bonds he would thereby remove the restrictions. And the gift was set aside—not because the Secretary did not remove the restrictions or did not have power to remove them, as petitioner now asserts—but because his removal of the restrictions was not sufficient to give validity to a gift which was void because of the mental incompetency of the donor. In other words, the gift was set aside, not because the Secretary did not remove the restrictions, but despite the fact that he had removed them. That

is made manifest by the opening paragraph of the District Court's opinion upon the merits (R. 173).

What the District Court decided was that the mere removal of restrictions did not convey a valid title to the donee of an incompetent donor; and it directed a return of the fund to the Secretary, not because restrictions had not been removed, but because it thought it best to *reimpose the restrictions which the Secretary had removed* (R. 195). But in its decrees it was careful to return the fund to the Secretary, and thereby reimpose the restrictions, *only after counsel had been paid* (R. 199, 201, 203, 205, 348, 349). And it should here be repeated that *petitioner expressly consented to that course* (R. 200, 203, 205).

When, therefore, petitioner asks this court to review a question as to whether the courts below had power to charge *restricted* property with allowances for attorneys' fees (Pet. p. 2), it asks it to review a question which the case does not present.

V.

The question raised has been in effect already determined by this court, and the decisions below upon this point were plainly right.

Let us now assume that restrictions were *not* removed.

Petitioner assigns, as a reason for granting the writ, that a question of Federal law of importance has been decided, which has not been, but which should be, settled by this court (Pet. p. 8). That, we submit, is erroneous—

even upon the assumption that the fund in question was and is restricted.

The case of *Kendall* v. *Ewert*, 259 U. S. 139, 149, was cited by both courts below (R. 335, 375), and is, we submit, directly in point and controlling, and actually decides the precise question petitioner here presents. In that case the suit was brought by an Indian against one to whom he had conveyed his *restricted* land, and the relief prayed for was a decree that the grantee held the land in trust for the Indian. The Indian died and the suit was revived in the name of his administrator and heirs. The heirs then settled with the grantee, and it was contended that an appeal by the administrator should be dismissed for the reason that he was not competent to prosecute it. The argument, as stated by this court, was that "the land involved continued *under restriction* until September 26, 1921, that neither it nor the royalties issuing therefrom could be incumbered until that date, and that both passed to the heirs so *freed from charges of any kind* that there was no property or estate for an administrator to administer and no function for him to perform." In rejecting that argument this court said (p. 149):

> "With this we cannot agree.
>
> "The petition in the case prayed for recovery of the land and also for an accounting for rents and profits. That Redeagle or his heirs could institute such a suit is not disputed *and to maintain it he must employ counsel and create court costs which should be paid.* The record shows that large sums in royalties for zinc and lead ores mined from the lands involved had been paid to Ewert, and these when accrued were clearly personal property (United States *v.* Noble, 237

U. S. 74, 80), which, on the death of Redeagle, would pass to his administrator for purposes of paying any inheritance or other taxes which might be properly chargeable against it, *and for other administration charges* and for distribution."

In *Winton* v. *Amos*, 255 U. S. 373, 393, the court stated that the principle upon which courts of equity award compensation out of a fund to counsel who have recovered or benefited the fund is *analogous to the salvage services of the maritime law*. The numerous cases in which this court has sustained and enforced claims for salvage services against property owned by a sovereign thus also sustain the right of the courts below to make the allowances in this case, even though the fund in question were in truth restricted; for the restriction against alienation without the Secretary's approval is no stronger and no more sacrosanct than a sovereign's immunity.

Special attention is called to *The Davis*, 10 Wall. 15, in which property of the United States was subjected to a claim for salvage services despite the sovereign's immunity from suit and despite the fact that the claim could not have been enforced by suit *in rem* against the property if it had been necessary, in order to enforce the claim, to take the property out of the possession of the government by any writ or process of the court. This court stated that when the property of the government has been saved from destruction by salvors, "justice and sound policy require that it should be held to bear its share of the burden which the unanimous voice of maritime nations imposes on all other property in like condition" (p. 19); and the court held that as the property was not in the possession of the govern-

ment (having been seized by the marshal under the libel while in the possession of the vessel which had contracted to carry it for the United States) the court could and should "enforce the lien of the libelants for the salvage *before it restored the cotton to the custody of the officers of the government*" (p. 22). The court also pointed out that by possession it meant *actual* possession, and not merely constructive possession implied from ownership, and that as the court could enforce the claim for services without "bringing the officer of the court into collision with the officer of the government, if the latter should choose to resist" (p. 22), the court had jurisdiction to enforce the claim.

Other cases to the same effect are:

United States v. *The Thekla*, 266 U. S. 328;
The Siren, 7 Wall. 152;
In re United States Steel Products Co., 24 Fed. 2d, 657 (C. C. A., 2d Circuit).

Those cases, we submit, authoritatively establish that, even if it be assumed that the fund here in question was restricted and could not have been subjected to claims for attorneys' services if the fund were in the actual possession of the Secretary of the Interior, yet, inasmuch as it was *not* in the actual possession of the Secretary, the claim for services may be enforced by the courts, and that it was the duty of the courts to enforce it before restoring the fund to the Secretary.

As stated by both courts below, the fund passed out of the possession of the Secretary and court action was necessary to get it back (R. 335, 374). Petitioner, by its intervention in respondents' suit, joined with respondents in

endeavoring to get it back; and as was said by this court in *United States* v. *The Thekla, supra*:

> "When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter. The absence of legal liability in a case where but for its sovereignty it would be liable does not destroy the justice of the claim against it. When the question concerns what would be paramount claims against a vessel libelled by the United States were the vessel in other hands, the moral right of the claimant is recognized."

The restriction against alienation without the Secretary's approval was imposed by Congress in order to protect the Indians from despoilers, and not to enable them to avoid just claims for services in recovering their property where the Secretary himself has turned despoiler.

Petitioner's present contention that the Secretary alone could authorize payment of a fee (Pet. pp. 14, 15) amounts to saying that the wrongdoer should determine his opponent's fee for undoing his wrongful act. If that be the law, similar acts may be done in the future with impunity.

As the property of the United States itself may be subjected to claims for services in salvaging it, there is no reason why the property of Indians may not be subjected to similar claims even though the Indian himself may have no right to convey or encumber it.

The courts below were clearly right in following the reasoning and adjudication of the cases above cited, and the case presents no new or unsettled question justifying a certiorari.

Attention is also called to *New York Dock Co.* v. *S. S.*

Poenan, 274 U. S. 117, in which a claim for wharfage of a vessel *in custodia legis* was allowed as a preferred claim upon the proceeds of the vessel. The court there stated that such a claim should be allowed as an "expense of justice" without regard to any equitable or maritime lien in a technical sense. The principle of that case, as well as much of the language in the opinion (pp. 121, 122), is applicable here, and it, also, in effect decides the question which petitioner puts forward as a basis for a certiorari.

VI.

The allowances were not excessive, and, in any event, petitioner's claim to the contrary affords no ground for a certiorari.

If there had been any good reason for supposing that this court would grant a certiorari to review the amount of the allowances, we certainly would have applied for a certiorari ourselves.

The District Court allowed counsel 25% of the fund plus $10,000 (R. 336), which amounted to $184,881.08 (R. 348, 349), and allowed the *prochein ami* $7,500.00 (R. 336). In fixing that amount it proceeded upon *its own judgment as to what was fair and reasonable* (R. 336). It did not follow or adopt either of the contracts to which petitioner devotes so much space (Pet. pp. 6, 7), although it would have been fully justified in so doing despite the fact that the contracts concededly were not binding upon it (*Winton*

v. *Amos*, 255 U. S. 373, 393; *McGowan* v. *Parish*, 237 U. S. 285, 299, 300).*

The Circuit Court of Appeals reduced the allowance to counsel to $100,000 (R. 377), which is but slightly over 15% of the recovery, even according to that court's method of computing the amount involved (R. 383), and considerably less than $125.00 per day for the time actually spent (R. 382). The $100,000 so allowed covered the services of four different law firms who had been engaged upon the litigation for substantially *five years*, and figured upon a yearly basis is thus the equivalent of only $5,000 per year for each firm (R. 382). Nor is that amount net to the lawyers, for their expenses for office work, clerk hire and stenographers' services had to be paid.

Both courts below certainly are in agreement that the amounts as finally allowed are not excessive; and in *United States* v. *Carter*, 217 U. S. 286, 319, 320, this court said with respect to an allowance to counsel out of a fund:

> "So far as the amount of the allowance is concerned, we do not feel authorized to disturb it, as two

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*With reference to the contract of Cochran & Ellison with certain heirs of Barnett referred to at p. 6 of the petition, we desire to state that the services in question were not rendered under it and it never was relied upon by respondents for any purpose whatever. It was put in evidence upon the trial *by defendant Mission Society* upon a point which had nothing to do with any question of allowances, as petitioner well knows. All services in this litigation were rendered under the retainer of the next friend.

With reference to the contract of Hummer & Foster with Bailey *as guardian*, we desire the court to note that it was approved by the Oklahoma County Court which appointed the Guardian (R. 235, 266) and was authorized by the law of that State (*Okl. Comp. Stat.* 1921, sec. 4101; *Berryhill* v. *Spillers*, 232 Pac. 376, 377; *Cotner* v. *Lon Jacobs Grocery Co.*, 202 Pac. 997, 1000; *Evans* v. *Harris*, 158 Pac. 898; *In re Myers' Estate*, 219 Pac. 943) and also by the law of New York (*Judiciary Law*, Sec. 474; *Matter of Fitzsimons*, 174 N. Y. 15; *Morehouse* v. *Brooklyn Heights R. R. Co.*, 123 App. Div. 680, affirmed 195 N. Y. 537; *Matter of Meng*, 227 N. Y. 264). While not technically binding upon the courts below (as we freely conceded), it could have been, and we submit should have been, adopted by them as a measure of the compensation to which counsel were entitled (*Winton* v. *Amos*, 255 U. S. 373, 393; *McGowan* v. *Parish*, 237 U. S. 295, 299, 300).

courts in succession have concurred in the amount allowed as reasonable."

It may be added, too, that the allowance as fixed by the Circuit Court of Appeals is much less, proportionately, than this court allowed to a Special Master in *Newton* v. *Consolidated Gas Co.*, 259 U. S. 101. In that case this court allowed a total of $49,250 for 282 days' work, which is at the rate of $175.00 per day for the services of a judicial officer in a matter which involved no element of risk or contingency, whereas here the compensation of respondents necessarily had to be entirely contingent upon success because otherwise there was no source from which payment could be obtained (R. 211, 235, 236, 283, 284).

In *Hodgman* v. *Atlantic Refining Co.*, 8 Fed. (2d) 777, the District Court in Delaware allowed *one-third* of the recovery up to $500,000 and 10% of the excess up to $1,000,000 and 5% of the excess above $1,000,000.

In *Grant* v. *Fletcher*, 283 Fed. 243, 274, the District Court in Michigan awarded 50% of the recovery.

In *Frinck* v. *McComb*, 60 Fed. 486, decided as long ago as 1894, an allowance of one-third of the recovery, with interest, in addition to expenses, was made by Judges Dallas and Wales.

In view of the foregoing, we feel we should refrain from burdening the court with even a summary statement of the extent and nature of the services rendered. The fact that the complete record is not here prevents the court from having a complete view of them, but the attention of the court is directed to the affidavits of services at R.

210-292 and 318-330 and also to the opinion of the District Court at R. 331-337.

In *United States* v. *Johnston*, 268 U. S. 220, 227, it was said that this court does not "grant a certiorari to review evidence and discuss specific facts."

In *Southern Power Co.* v. *North Carolina Pub. Serv. Co.*, 263 U. S. 508, the certiorari was dismissed because the argument developed that a question of fact only was involved.

VII.

The petition should be denied in the interest of substantial justice.

We agree with the statement at page 16 of petitioners' brief that the duty devolved upon the United States to protect the Indian. Had that duty been performed, the fund never would have passed out of the Secretary's custody, and there would have been no law suit and no attorneys' fees to be paid. The entire situation is thus due to petitioner's violation of its duty.

With reference to petitioner's statement that, the wrong having been done, the United States *should* have assumed the whole burden of recovering the property (id. p. 16), we call attention to the fact that this court has expressly stated that "In what cases the United States will undertake to represent Indian owners of restricted lands in suits of this sort is left under the Acts of Congress to the discretion of the executive department" and that the

Indian "may be permitted to bring his own action, or if so brought the United States may aid him in its conduct" (*Heckman* v. *United States*, 224 U. S. 413, 446).

Here, the United States did not undertake to represent the Indian at all (despite these respondents' pleas that it do so) until after the Indian had brought his own action through these respondents, and the method of representation which it elected was an intervention in the Indian's suit. Even after that intervention it consciously and deliberately left to the respondents "the heat and burden of the conflicts which established Barnett's right to claim his own", as both courts below have expressly found (R. 332, 375). As stated by the Circuit Court of Appeals, the respondents "did substantially all that was done" (R. 375).

For the United States now to say that respondents should not be paid—or, rather, should be forced to return what they already have been paid—shocks one's sense of decency and fairness, and is contrary to the "most elementary notion of justice" (*N. Y. Dock Co.* v. *S. S. Poznan*, 274 U. S. 117, 121).

For it to say that the interests of the United States and of the next friend and his attorneys "were in material aspects adverse from the beginning" because respondents were suing to "recover the property for *Bailey*" and that the respondents "had a double interest in the suit" (Pet. pp. 16, 17), is a patent and inexcusable mis-statement of fact. The plaintiff in the case was *Barnett, not Bailey*, and the prayer of the bill was that the bonds and their proceeds be returned to the plaintiff (R. 25). Of course, respondents expected to be paid for their services, as all

attorneys do, but they neither had nor represented any interest in the case except the interest of Barnett—and it was Barnett who won as a result of respondents' efforts.

The petition should be denied.

Respectfully submitted,

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Counsel for all Respondents other than The Equitable Trust Co. and Murray, Aldrich & Roberts.

January 1930.

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F I L E D
APR 29 1
CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1929

No. ~~520~~ 21

UNITED STATES OF AMERICA,

Petitioner,

against

THE EQUITABLE TRUST COMPANY OF NEW YORK; MURRAY, ALDRICH & ROBERTS; EDWARD J. PATTERSON, J. FREDERICK EAGLE, WILLIAM GREENOUGH, SHERMAN DAY, CARROLL G. WALTER and DODGE L. MARKS, composing the firm of PATTERSON, EAGLE, GREENOUGH & DAY; RAYBURN L. FOSTER and R. B. F. HUMMER, composing the firm of HUMMER & FOSTER; ALMOND D. COCHRAN, surviving partner of the firm of COCHRAN & ELLISON; C. B. McCRORY and DUDLEY C. MONK, composing the firm of McCRORY & MONK; and ELMER S. BAILEY, individually and as *prochein ami* of Jackson Barnett,

Respondents.

CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS TO WHOM ALLOWANCES WERE MADE

JOHN W. DAVIS,
Counsel for said Respondents,
15 Broad St.,
New York, N. Y.

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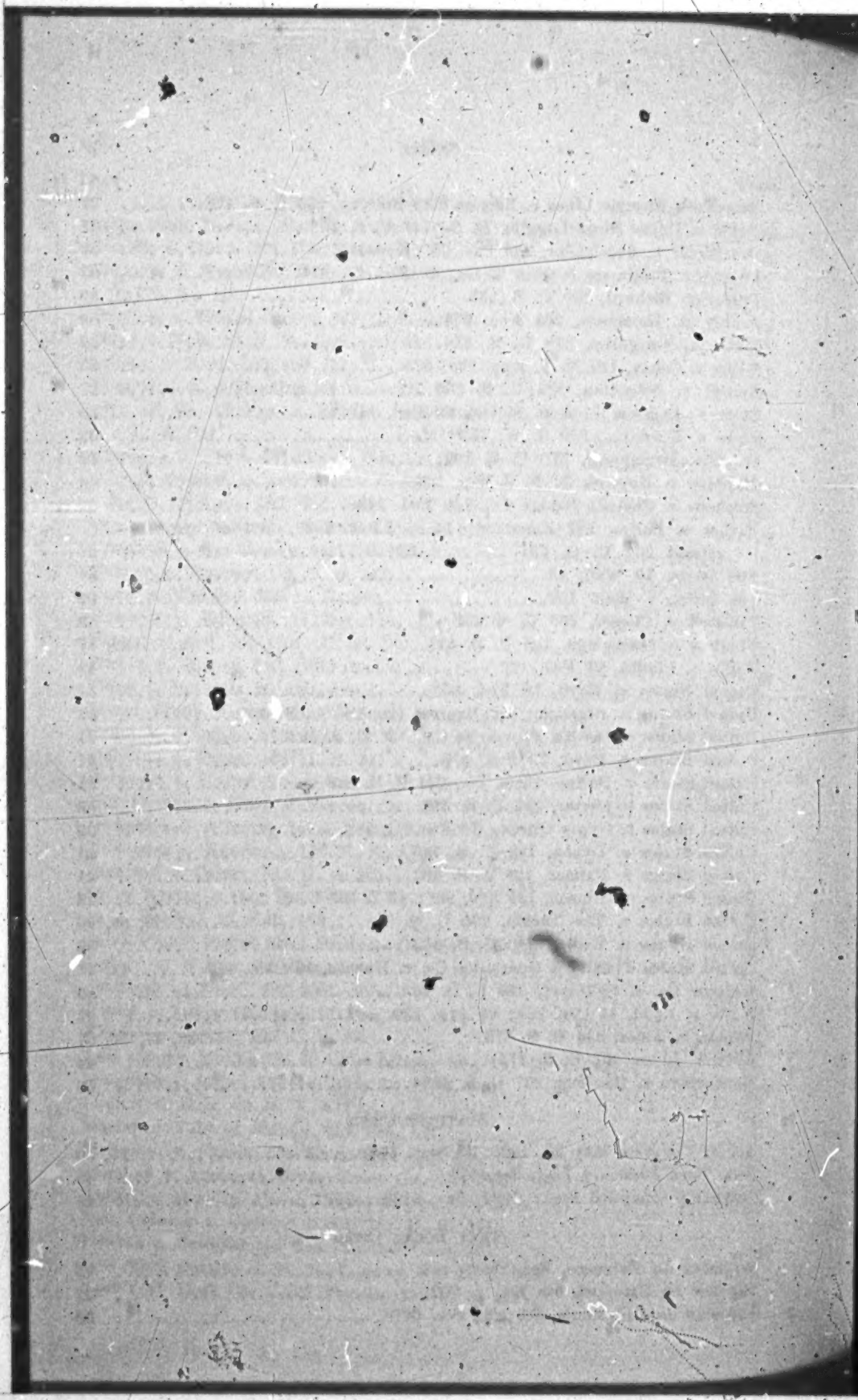

Supreme Court of the United States

OCTOBER TERM, 1929.

UNITED STATES OF AMERICA,
Petitioner,
against
THE EQUITABLE TRUST COMPANY OF NEW YORK; MURRAY, ALDRICH & ROBERTS; EDWARD J. PATTERSON, J. FREDERICK EAGLE, WILLIAM GREENOUGH, SHERMAN DAY, CARROLL G. WALTER and DODGE L. MARKS, composing the firm of PATTERSON, EAGLE, GREENOUGH & DAY; RAYBURN L. FOSTER and R. B. F. HUMMER, composing the firm of HUMMER & FOSTER; ALMOND D. COCHRAN, surviving partner of the firm of COCHRAN & ELLISON; C. B. MCCRORY and DUDLEY C. MONK, composing the firm of MCCRORY & MONK; and ELMER S. BAILEY, individually and as *prochein ami* of Jackson Barnett,
Respondents.
No. 530.

CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS TO WHOM ALLOWANCES WERE MADE.

(Being all respondents except Equitable Trust Co., and Murray, Aldrich & Roberts)

State of the Record.

The printed transcript does not contain the entire record. Besides the matter there contained, several vol-

umes of "depositions, testimony, exhibits and briefs", pertinent as showing some of the facts here relied upon as well as the extent and nature of the services rendered, were before the courts below as part of the record although not actually printed. The parties so stipulated and the court so ordered. (See R. 172-174.) A suggestion of diminution was submitted by us January 13, 1930, but has not been passed upon. If the court decide that petitioner may proceed without printing the entire record, we ask the privilege of submitting one copy of the additional matter unprinted, as was done in the Circuit Court of Appeals.

Opinions Below.

The opinion of the District Court reported in 21 Fed. 2nd 325, is its opinion upon the merits of the case, and not the opinion it delivered in making the decree now under review. That opinion is not reported, but is printed at R. 160-163.

Jurisdiction.

In opposing the granting of this certiorari we urged that, as our petition for rehearing in the court below was actually denied September 7, 1929, and the denial entered of record September 11, 1929 (followed by issuance of mandate to District Court September 11, 1929), the petition for this writ was out of time when filed December 13, 1929. That point, also, is involved in our suggestion of diminution of record submitted January 13, 1930, and not yet formally acted upon by the court. A certified transcript of the proceedings in the court below, showing that it in

fact denied the rehearing more than three months before this certiorari was applied for, is, however, presented with our suggestion of diminution; and unless the point is regarded by the court as having been foreclosed by its action in granting the certiorari, we respectfully again urge that the application was made too late and the certiorari should be dismissed for want of jurisdiction. (See pp. 2-5 of Brief for Respondents in Opposition to Petition for Writ of Certiorari.)

Outline of the Facts.

Petitioner's statement, we feel, does not adequately present the case. There are additional facts which are most material.

Jackson Barnett, in addition to being a full-blood Indian, is *mentally incompetent*, and was so adjudged in 1912, when the proper Oklahoma court appointed a guardian for him (R. 64-66).* In 1920 a white woman kidnapped him, carried him off to Kansas, and married him (R. 68, 69, 84). The marriage was part of a conspiracy to obtain his wealth (R. 68, 69, 84). The woman engaged a Kansas lawyer named McGugin, who negotiated with the then Commissioner of Indian Affairs and other officials for a "distribution" of Barnett's estate then held by the Secretary of the Interior (R. 73-75; 87-91). After McGugin and the Commissioner had agreed upon a fifty-fifty distribution to the wife and to a charity selected by them, Barnett was brought

*Petitioner's failure to present the entire record to this Court makes it impossible for us, in all instances, to give references to the evidence directly establishing some of the facts but for present purposes references to allegations made by petitioner itself and to findings of the courts below are deemed sufficient.

to Washington and made to put his thumb-mark upon an elaborate letter to the Secretary of the Interior in which he stated his desire to make such a gift—$550,000 to the wife and $550,000 to American Baptist Home Mission Society, which had been selected as a "suitable" charity (R. 75, 89-91; 20-23). Secretary Fall "approved" the gift, and thereby removed the restriction on alienation, February 1, 1923 (R. 75, 76) and Barnett's bonds to the extent of $1,100,000 were distributed accordingly.

The Oklahoma court which had appointed the guardian directed him to take steps to recover the gift (R. 114). The guardian did not rush in with a lawsuit. He petitioned Secretary Work, who had succeeded Secretary Fall, to vacate the approval and give his assistance in getting the bonds back, but Secretary Work refused, or at least did nothing (R. 114). The then guardian thereafter resigned and Bailey was appointed as his successor in June, 1924 (R. 113, 114). Bailey, through some of the respondents, again laid the matter before the Secretary of the Interior and also before the Department of Justice (R. 115, 116; 137-139). Their repeated requests that something be done to recover the bonds, or that they be supplied with the funds necessary to accomplish that purpose, were pointedly and definitely rejected by the Secretary of the Interior (R. 116, 117, 138, 139), and the Department of Justice did nothing (R. 117, 118, 160, 161).

Almost two years elapsed after the consummation of the gifts, with still nothing done; and in January, 1925, Bailey, through these respondents as counsel, caused to be instituted in the District Court for Southern New York a suit by Barnett to recover the $550,000 of bonds which had

been given to the American Baptist Home Mission Society. The bill prayed that the bonds be returned to *the plaintiff* (R. 13), and as petitioner here repeatedly treats that prayer as a demand that the bonds be returned to Bailey we here emphasize the fact that the plaintiff was Barnett, not Bailey, and that Bailey did not cause the suit to be instituted in his capacity as guardian but merely as a *prochein ami* (R. 2). Bailey was not a party to the suit, either individually or as guardian, and hence the prayer of the bill cannot be construed as a demand that the bonds be turned over to him. It was, of course, assumed that if the bonds were gotten back from the defendants the court would not direct that they be placed in the actual physical custody of a mental incompetent. Some custodian there would have to be, but the determination of who the custodian should be was expressly left open. As Barnett owned the bonds, and as Barnett was the plaintiff, the prayer had to be that the bonds be returned to him; and they will be returned to him, within the meaning of the prayer of the bill, when they are returned to the Secretary "to be held by him as property of said Jackson Barnett" (R. 97).

Other suits in other jurisdictions were also brought to recover the other $550,000 (R. 117, 118, 137, 138).

About the time respondents brought these suits, a Committee of Congress made some investigation of the part taken by the Commissioner of Indian Affairs in the making of the gifts (R. 115, 138), and in its report to Congress it mentioned this suit and the others and stated that it would be futile for it to express an opinion upon the gifts as that was a matter to be determined by the courts, but that the

question was "of such fundamental importance that it should be determined by the courts as soon as possible" and

> "We therefore are of the opinion that the Secretary of the Interior would be justified in expending a reasonable sum out of the funds of Jackson Barnett in securing an early determination by the Supreme Court of the United States of the issues which have been raised." (R. 117.)

Despite that recommendation of the Congressional Committee, the Secretary of the Interior persisted in his refusal to allow any part of the funds of Barnett to be used in defraying the expenses of the suits brought for the recovery of the gifts (R. 117).

Meanwhile, respondents were still endeavoring to enlist the aid and assistance of the Department of Justice (R. 115-118; 138-139). It later was shown, upon the taking of testimony in this case in June, 1926, that Attorney-General Stone had advised Secretary Work, in February, 1925, that he thought the gifts were unauthorized and that it was the duty of the Government to aid in recovering them (R. 118), but Attorney-General Stone ceased to be Attorney-General immediately thereafter and neither the Secretary of the Interior nor the Department of Justice took any action in that direction. On the contrary, in April, 1925, the Department of Justice filed, in another suit, an answer on behalf of the Secretary of the Interior and the Commissioner of Indian Affairs which indicated that it intended to aid in *upholding* the gifts (R. 118, 119).

Respondents nevertheless continued to urge upon the

Department of Justice that it was the duty of the Government to aid and assist them in their efforts to set aside the gifts, and submitted to that Department memoranda of the facts and the law (R. 115, 116, 118, 124, 139, 140).

The defendant Mission Society and Mrs. Barnett, to whom the other $550,000 had been given, instituted litigation in Oklahoma attacking the validity of the appointment of the guardian—which, of course, involved the validity of the adjudication of Barnett as mentally incompetent—and also attempted, by means of a writ of prohibition from the Supreme Court of Oklahoma, to stop the prosecution of this and other suits for the recovery of the gifts (R. 120-124); and respondents rendered very extensive services in that litigation (R. 120-124; 131-136).

In November, 1925, the United States finally concluded to ask leave to intervene in the suit which respondents had brought in January, 1925, for the recovery of the $550,000 given to the Mission Society (R. 104, 125, 139, 140, 154), after some of the respondents had spent another two weeks in Washington urging that course (R. 139, 140). The United States also intervened in the litigation in Oklahoma in an effort to uphold the guardianship and resist the requested writ of prohibition (R. 125).

The application of the United States for leave to intervene in this case was strenuously resisted by the Mission Society upon the ground, in substance, that the Secretary of the Interior and not the Department of Justice was the proper representative of the United States in such a matter and entitled to determine its policy with respect thereto (R. 53). Respondents actively aided the United States in having its motion granted by, among other things, actually

furnishing to it, at its request, the authorities which the court afterwards cited as sustaining the right to intervene (R. 104, 155; and see opinion of THACHER, *J.*, granting the intervention at R. 51-54).

In its intervening petition the United States prayed that the bonds be declared to be the property of Jackson Barnett and returned to the Secretary of the Interior *"after deducting the reasonable expenses incident to this litigation"* (R. 50, 51; 104; 155).

At the time the United States asked leave to intervene there was pending before the court a motion by respondents for an allowance out of the fund for the purpose of obtaining the money immediately necessary to enable the suit to be prosecuted (R. 154, 103, 104). Decision upon that motion was withheld for a time at the request of the United States (R. 154), but the United States did not oppose the granting of the motion (R. 154, 62). The motion *was* opposed, however, by the defendant Mission Society *upon the precise ground which the United States now urges upon this certiorari*, viz., that the court was without power to grant it because the fund is restricted against alienation except with the approval of the Secretary of the Interior (R. 103, and footnote at p. 24 *infra*).

Despite that opposition, the motion was granted by Judge THACHER by order dated March 2, 1926 (R. 62), and no appeal was taken.

From March, 1926, until January, 1927, respondents were working upon this case *practically continuously* (R. 105), examining documentary evidence, locating and interviewing witnesses, taking depositions in various cities, preparing for trial, trying the case, preparing briefs upon the

merits, &c. (R. 105-109; 111). The trial itself occupied six days (R. 108). The record is over 3,500 pages, and the briefs submitted by respondents on behalf of the plaintiff were 473 printed pages (R. 111). The District Court held the case under advisement for over seven months (R. 109). Subsequent services included the appeal of the Mission Society to the Circuit Court of Appeals and the application to this court for certiorari, and continued to October, 1928 (R. 109-111).

The Interior Department actively opposed the suit from beginning to end. Secretary Work formally and expressly requested the Attorney-General to decline to assist respondents (R. 112, 118; and see finding of District Court at R. 161), and Commissioner Burke actively aided the defendants, not Barnett, upon the trial (R. 112).

The Department of Justice did not yield to the Interior Department's request that its assistance be withheld from respondents, but it consciously, deliberately, and persistently left the burden and heat of the contest upon respondents (R. 125; 155-158; 159). Both courts below have expressly so found (R. 160, 161; 178), the Circuit Court of Appeals saying that respondents "did substantially all that was done" (R. 178).

Moreover, respondents were assured by officials in the Department of Justice that in the event of success they would experience no difficulty in obtaining liberal compensation (R. 159), and it was not until after the Mission Society's appeal had been dismissed and this court had denied a certiorari—in other words, after the suit was won and after the application for allowances had been submitted—that there was the first intimation that respondents'

right to an allowance would or could be questioned. (See comment of District Court at top of R. 162.)

Statute and Regulations Relied Upon by Petitioner.

It is conceded that Barnett's allotment, and also the bonds representing investments of accumulated royalties from the lease thereof, were restricted against alienation under the Act of May 27, 1908, 35 Stat. 312, quoted at pp. 2, 3, 4 of petitioner's brief.

The validity of the regulations there quoted is, however, *not admitted*. Their validity was one of the issues involved in this case. Petitioner itself asserted, in its intervening petition, that the guardian was validly appointed and recognized as such by the United States (R. 66), that the Secretary had authority to disburse Barnett's funds only to the guardian (R. 72), and that the amendatory regulation of October 7, 1922, quoted at page 5 of petitioner's brief, was adopted in order to permit or justify the making of the gift in question and was *void* (R. 74, 75). Petitioner withdrew that allegation upon the trial (R. 83), but the issue as to its validity remained in the case under the bill filed by respondents (R. 9, 10).

No decision as to its validity appears to us to be necessary now, and hence we do not argue the question; but we do not wish to allow petitioner's quotation of the regulation to pass unnoticed as if its validity were unquestioned.

The Fee-Agreements Referred to by Petitioner.

These are wholly immaterial. Respondents did not act under them in bringing the suit, and they never did and do not now base their right to an allowance upon them.

The contract with Hummer & Foster, referred to at pp. 9, 10 of petitioner's brief, was made in Oklahoma with Bailey *as guardian*, with the approval of the Oklahoma court having jurisdiction of the guardianship (R. 114, 125; 127-130). The suit, however, was not brought by Bailey as guardian, and the services were not rendered to him.

The contract with Cochran & Ellison, referred to at pp. 10, 11 of petitioner's brief, was made with certain next of kin and heirs-apparent of Barnett, and it was made prior to Bailey's appointment as guardian (R. 152, 153). Cochran & Ellison and McCrory & Monk did not act under that contract in rendering services in this case, but, on the contrary, acted at the request of Hummer & Foster (R. 114, 115) before Hummer & Foster's contract with the guardian was made (R. 137).

The other respondents did not even know of either of the contracts when the suit was instituted; and *all* respondents acted throughout upon the assumption that their compensation would have to come in the form of an allowance by the court. The assertion, at p. 30 of petitioner's brief, that respondents "entered into this litigation under contingent-fee contracts, under which they agreed to take care of the expenses of the litigation, and in connection with which they freely testified they understood they were to get nothing until the fund had been recovered by their client, Bailey" is not supported by any reference to the record and is wholly untrue in each and every respect.

The Issues which Were Tried, and Nature of Court's Decision upon the Merits.

Petitioner's main contention is built so emphatically upon the assumption that the Secretary's act in approving the gift has been *adjudged to be void*, that we desire to point out here that that assumption is unfounded.

Petitioner's other assumption that the case was really only a trivially simple affair (Brief, pp. 38, 39) likewise needs correction.

The bill which respondents first filed was based upon "the simple proposition that a mental incompetent had made a gift which was void because of his mental incapacity" (R. 102). The answers which were filed to that bill set up as a defense that the plaintiff was "a restricted Indian" and as such was subject to the jurisdiction of the Secretary of the Interior, who had approved the gift, and that in view of such approval no person had any right to attack the validity thereof (R. 102). In view of such answers, an amended bill was filed (R. 103). That amended bill set out, not only that Barnett was mentally incompetent, but also the facts as to how the gifts and the Secretary's approval were obtained; and it charged a conspiracy to obtain Barnett's property (R. 7, 8), an obtaining of the Secretary's approval by misrepresentation of facts (R. 10), and an abuse of discretion and excess of jurisdiction on the part of the Secretary, and also fraud on his part if he knew the facts (R. 11, 12). It also challenged the Secretary's right to pay out or surrender possession of Barnett's funds to anyone other than to or through a legal guardian upon proper order of the court which had appointed the guardian (R. 9).

Petitioner itself likewise alleged that Barnett was a *mental incompetent* (R. 64) and had been duly so adjudged (R. 66), and also set forth conspiracy, fraud, misrepresentation, abuse of discretion, and excess of jurisdiction, in stronger terms than respondents had used in their amended bill (R. 67-70; 73-81), and it likewise challenged the Secretary's authority to distribute the fund to anyone other than the guardian (R. 72, 74, 75).

The issues of fact raised by the pleadings thus were of the broadest and most comprehensive sort—mental capacity, conspiracy, and fraud—and such issues in any case, and particularly in a case involving Government officials, certainly justified and required the most careful and painstaking efforts on the part of counsel to see that the evidence was fully and carefully and accurately presented. The questions of law raised by the pleadings were likewise varied and important and novel—particularly novel in the jurisdiction in which they were presented; and counsel for petitioner has so admitted (R. 145).

It is true that at the opening of the trial petitioner very nearly emasculated its intervening petition by withdrawing some of its most important allegations (R. 83), but that withdrawal was not made until *after the depositions had been taken and the case otherwise prepared for trial;* and, moreover, respondents did *not* withdraw any of the allegations of their amended bill. Still further, petitioner did not withdraw its allegations of fraud practiced upon the Secretary (R. 83, and see p. 10 of brief filed by petitioner in opposition to Mission Society's application for writ of certiorari, No. 320 of October Term 1928, 278 U. S. 626).

Petitioner's present assertion (pp. 38, 39) that the case involved a single issue of fact, which was determined by the court without the assistance of any one, and a single issue of law, is thus far from accurate, and contrary to the sworn statements of petitioner's own attorneys (R. 142-152). A demonstration of its inaccuracy will also be found in the opinion delivered by the District Court in deciding the case, for the opinion shows that the court regarded the evidence which had been adduced as to the circumstances of the gift as being material (R. 84-91).

As to what the District Court actually decided, it is important to note the opening paragraphs of its opinion, which fully disclose its reasoning (R. 84 and 21 Fed. 2d, 326):

> "For the purposes of this case, it may be assumed that the Secretary of the Interior had power and authority to remove the restrictions which the Congress of the United States has placed upon the property of Jackson Barnett, as a full blood Indian of the Creek tribe, and to approve such gifts and donations of his property as he, in fact, made. But, such approval, however honest and disinterested it may have been, cannot give validity to a gift or donation which the apparent donor did not make, and which, by reason of mental incompetency, he was incapable of making. *Jennings* v. *Wood*, 192 Fed. 507; *Kendall* v. *Ewert*, 259 U. S. 139.
>
> "The record now before the Court is of great volume, and it would be a laborious task to summarize all the details of the amazing set of facts that seem to me to compel a conclusion that the instruments under attack should be set aside. By reason of this, my re-

cital of the matters by which I am convinced of Barnett's mental incompetency will be as brief as they can understandingly be stated."

The court thus assumed that the Secretary's act was *valid* but held it to be nevertheless *ineffectual* because even a *valid approval* does not effectuate a gift which in itself is invalid because of the donor's mental incompetency.

It is true that in a subsequent part of its opinion the court described the Secretary's act as "a nullity" (R. 95), but the context makes it clear that the word *nullity* was there used as indicating ineffectiveness in consummating a gift of Barnett's property, and not as indicating any lack of authority to remove restrictions or any invalidity in the Secretary's own act; for the complete setting of the statement is this (R. 94, 95):

"From all the evidence in the case, I am strongly of the opinion that the gifts which purport to have been made by Barnett *cannot be regarded as his acts and deeds, and must be held to be void, and of no effect.* The alleged donor had no real comprehension and understanding of what he was induced to do, and thus was without that clear and unmistakable intention to part with his property which is, as I understand the law, an essential requisite of a gift *inter vivos.* (*Snavely* v. *Henderson*, 204 Fed. 978, and cases cited in 28 C. J. 627.) It is impossible for me to think that Barnett had any more appreciation or concern for the welfare of Bacone University than was felt by some one of his ancestors who passed to 'the happy hunting grounds' of legend, long before he was born. That he knew the value and extent of his property, or conceived the nature of the provisions for himself in the trusts that

were created, appeals to me as incredible. While he is not insane, and is not an idiot, his intelligence is so stunted and undeveloped that he lacked the capacity to know what he was doing. In consequence of this, and as stated at the outset, there was nothing upon which the approval of the Secretary could operate, and his acts in the premises were a nullity. *Whatever may have been his authority to release restrictions upon Barnett's property*, and admitting the honesty of his belief and that of his subordinates, that the arrangements made were for the Indian's benefit, he was without authority, as were Burke, McGugin, Ward and Mrs. Barnett *to appropriate and give away* property to which they had neither title nor power of disposition."

The court thus again assumed that the Secretary had "authority to release restrictions upon Barnett's property" but said that he was without authority "to appropriate and give away" property to which he had no title; and what it ruled was that as Barnett was incompetent, the Secretary's approval was ineffectual to make a valid gift. The court then, in its next sentence, declared that "the instrument under which Barnett's funds were removed from the custody of the Secretary"—not the Secretary's approval of that instrument—"was and is invalid" (R. 95).

In the concluding paragraph of its opinion the court mentioned the fact that a guardian had been appointed for Barnett in *California*, and it then said (R. 95, 96):

"In view, however, of the fact that the property of Barnett in the hands of the present defendants should not have been removed from the custody of the Secretary of the Interior, under the circumstances then pre-

sented to him, I think the same should be returned to the custody of that official, and there is *no necessity to deal with the question of the relative rights thereto of the Secretary and the guardian of Barnett*, who may at any time have been appointed by either of the States of Oklahoma and California."

The court thus did not attempt to *adjudicate*, as between the Secretary and any guardian, their relative rights to the fund. Knowing that the fund obviously could not be put into the actual physical custody of Barnett, it merely ruled that it should go back to the custody from which it came—there being no guardian before the court claiming a right to the fund.

That the District Court never intended to hold that the Secretary's approval of the gift *considered as a removal of restrictions* was "a void act" or "void and without authority of law", as now asserted at pp. 20-23 of petitioner's brief, is thus clear, we submit, from the opinion delivered by that court in deciding the merits of the case. But if that opinion be in any way ambiguous upon that point, that ambiguity is removed when we look at the court's *decree*, wherein it expressly reserved jurisdiction to make allowances out of the fund before returning it to the Secretary (R. 97), and when we look at what the same judge said of the matter when the question was specifically brought to his attention (R. 162):

"Furthermore, the order, entered upon my findings and conclusions on the merits of the case, clearly implied that fees and expenses in connection with the suit were expected by counsel, and would be allowed by the court. So far as can be remembered, no objec-

tion to such implication was expressed or taken. And certainly, the Government took no appeal from the order. It would appear, therefore, that the question as to the right of the court to make a reasonable allowance had come close to being decided, if it were not already determined.

"Had the Secretary of the Interior never permitted the fund which forms the subject matter of this suit to get beyond his possession and control, I will agree that the court would be powerless to grant relief to any of the present petitions. *The then Secretary, however, saw fit to release the supervision over the disposition of the fund which had been committed to him by Congress.* He was not incompetent, as was the case with respect to Barnett, and until the fund is restored to the possession of the Department of the Interior, that Department is without license to complain that the reasonable costs and expenses incident to the restoration of the fund to its control, are deducted therefrom. The fund is now a *res* within the control of this court, and justice requires that such *res* should bear the fees and expenses of its preservation. *Kendall v. Ewert*, 259 U. S. 139, 149."

Summary of Argument.

Even if petitioner's premises be correct, the answer to its argument is that the United States did in fact consent that respondents be paid out of the fund, and such consent having been so given, it cannot now be revoked after respondents have acted upon it (*Infra*, pp. 19-28).

The order awarding expense money actually adjudicated the right and power of the court to make allowances

out of the fund, and such adjudication is binding upon petitioner as *res adjudicata* (*Infra*, pp. 29-33).

Respondents further contend that the Secretary removed the restriction on alienation when he approved the gift and surrendered his custody of the bonds, and that such removal of the restriction was not and has not been held to be void (*Infra*, pp. 33-36).

Furthermore, the fund was subject to allowances by the court even though the restriction on alienation had not been removed (*Infra*, pp. 36-47).

Respondents had both an equitable and a statutory lien upon the fund and are entitled to an allowance out of it for that reason. Petitioner's contention that the allowances are erroneous because respondents did not perform certain fee contracts is not open for review here, and, in any event, is untenable (*Infra*, pp. 47-53).

The amount of the allowances should not be disturbed. The court must presume, in view of the absence of the complete record, that the decree below is supported by the evidence, and, moreover, this court will not disturb an allowance which two courts below have agreed is not excessive. Moreover, the allowances are in fact fair and reasonable (*Infra*, pp. 53-61).

POINT I.

The United States has in fact consented that respondents be paid out of the fund.

Petitioner describes the decisions below as "an interference with the exercise of the governmental power of the United States over the property of its Indian wards" (p.

16), and stresses the point that "this possession of the United States of Indian funds" is "more than a mere relation of trustee and beneficiary" and is "an exercise of a sovereign, governmental right and policy on the part of the United States" (p. 18), and that "no authority other than the United States" may to the slightest extent "interfere with the exercise of such governmental powers on the part of the United States, in the control, administration, and protection of such Indian funds" (p. 19).

Accepting those assertions *arguendo*, our answer to petitioner's argument is that the United States itself has in fact consented that respondents be paid out of the fund, and the courts below merely gave effect to that consent. The consent has been manifested in numerous ways.

1. Whether or not the United States would take any step to recover this $550,000 for Barnett was a matter of discretion—the rule being stated in *Heckman* v. *United States*, 224 U. S. 413, at p. 446, as follows:

> "In what cases the United States will undertake to represent Indian owners of restricted lands in suits of this sort is left under the acts of Congress to the discretion of the Executive Department. The allottee may be permitted to bring his own action, or if so brought the United States may aid him in its conduct, as in the *Tiger* case."

The United States here elected not to sue and permitted the allottee to "bring his own action." It of course knew that legal services were necessary and were being rendered, and by permitting respondents to bring and proceed with

the action as counsel for the allottee it impliedly consented and agreed that the allottee's property be applied to the payment of those services.

It is of course elementary and familiar law that a contract or agreement to pay for services rendered will be implied, and that rule is equally applicable to the United States.

United States v. *Palmer*, 128 U. S. 262, 269;
United States v. *Berdan Fire-Arms Co.*, 156 U. S. 552, 569;
United States v. *Lynah*, 188 U. S. 445, 464;
United States v. *Buffalo Pitts Co.*, 234 U. S. 228, 232-235.

2. When the United States finally concluded to aid the allottee, it did so by intervening in the suit which it had permitted him to bring through these respondents. Equity Rule 37 expressly provides that an intervention "shall be in subordination to, and in recognition of, the propriety of the main proceeding"; and by its intervention the United States, both expressly and impliedly, conceded the right of Barnett to bring this particular suit and the propriety of these respondents as counsel and next friend therein.

That again carried with it, according to settled and familiar elementary principles of implied contracts, an implied consent that the services of the respondents in the suit be paid for out of the property of the allottee whose cause of action they were prosecuting.

Petitioner asserts that when the United States assumes to act "such action on the part of the United States necessarily precludes the prosecution of suits by any and all

persons, including the ward himself, for any similar purpose relating to the same property" (Brief, pp. 19, 36, 37). But that merely shows that if the United States had brought a separate independent suit it might have stopped respondents' suit. It did not elect to bring a separate suit, and the fact that it elected to intervene in respondents' suit thus emphasizes the fact that the United States thereby consented to respondents going ahead and thereby impliedly consented to their being paid out of Barnett's funds.

It is of course true that the Indian cannot by his own act defeat the restriction against alienation or prevent the United States from enforcing it for his benefit, but the *Heckman* and *Tiger* cases both expressly recognize that the Indian may sue to recover his restricted property and may continue such suit even though the United States come in to aid him. That is what was done in the *Tiger* case and what the court reiterated in the *Heckman* case as something which might be done. (See quotation, p. 20 *supra*.)

It is true that the Secretary of the Interior did not request the intervention of the United States. In fact, he opposed it (R. 112). But he was in that respect overruled by the Department of Justice, and when the United States intervened it was the entire executive department, the complete sovereignty, which intervened—the Interior Department as well as the Department of Justice—and the Secretary of the Interior is thus bound by the intervention with all its implications and consequences.

It should be noted, too, that the ground of the opposition of the Mission Society to the intervention of the United States was that the Attorney-General was not

authorized to act for the United States in that matter "in the absence of request by the Secretary of the Interior or direction from the President of the United States" (R. 53), and the court allowed the intervention upon the ground that in such matter the Attorney-General was the authorized representative of the United States (R. 53, 54). Having asked and obtained such a ruling, the United States certainly cannot now claim that the intervention does *not* bind the United States and that a separate consent by the Secretary of the Interior is necessary.

3. In its petition of intervention, the United States, as previously stated, asked that the bonds be declared to be the property of Barnett and returned to the Secretary of the Interior *"after deducting the reasonable expenses incident to this litigation"* (R. 50, 51; 104, 155).

The United States thus thereby expressly consented that respondents be paid out of the fund. And being contained in a pleading, that consent amounted to a *judicial admission*, which no litigant is afterwards allowed to contradict (*Wigmore on Evidence*, Sec. 2590).

Petitioner now nonchalantly tosses that consent aside with the remark that "an amended petition was filed, *correcting* this matter" (Brief, p. 32). The supposed "correction" would seem to consist of the fact that the prayer of the amended petition does not in terms refer to deduction of expenses (R. 82), but obviously the amended petition was not filed for the purpose of eliminating that reference. A comparison of the allegations of the original petition (R. 47-51) with those of the amended petition (R. 63-82) will show that other purposes were in view; and a consent

once given cannot be withdrawn merely by failing to reiterate it. An amended pleading supersedes an original insofar as it serves the function of a pleading, but admissions contained in the superseded pleading are still admissions against the party making them.

4. When respondents asked the court for an allowance out of the fund for expense money with which to prosecute the suit (R. 103, 104), the United States did not oppose the application (R. 154, 62), although the precise point now urged by petitioner in opposition to the present allowances was then urged by the Mission Society in opposition to that application.* The Mission Society also opposed that application upon the further ground that as the United States had been permitted to intervene the requested allowance was unnecessary (R. 155)—the meaning of that being, of course, that the United States could supply the money necessary to take the depositions, &c. Nevertheless, the United States still did not oppose the motion and did not appeal from the order granting it; and thus the United States again recognized that the suit was to be pros-

*Petitioner's failure to bring the entire record to this court makes it impossible for us to give a supporting reference; but under the circumstances we feel justified in here quoting the following from the brief submitted by the Mission Society in opposition to that application:

"The affidavits upon which this motion is made show that the bonds forming the trust fund here involved were so long as they were in the possession of the Secretary of the Interior, the restricted property of plaintiff who was and is a restricted Indian. If it be assumed (which is, of course, not admitted) that the action of the Secretary of the Interior in turning over plaintiff's bonds to the Equitable Trust Company was illegal, nevertheless the bonds still remained and they, together with the accrued income thereon, are the *restricted property of plaintiff and subject to the sole and exclusive control of the Secretary of the Interior;* and the bonds must be returned and the accrued income thereon must be paid to the Secretary of the Interior; and *this Court has no power to direct any other disposition of the bonds or the accrued income thereon.*"

ecuted by respondents at the expense of the fund, and thereby consented that respondents' services should be compensated out of the fund.

Petitioner now asserts that the order granting the application for expense money was "an invalid order" (Brief, p. 29), but it took no such position at that time. What it means by that assertion obviously is that the court had no power to direct payments out of the fund without the consent of the United States, and its failure to take that position at that time thus emphasizes the point that the United States at that time did in fact consent that the suit be prosecuted at the expense of the fund. If the United States then knew or believed that the court could not direct the payment without its consent, then its failure to object amounted to an express consent.

The argument now made that the consent related only to the particular $3,000 then asked for immediate actual expense of depositions, &c., is, we submit, too narrow and technical for serious consideration. The suit either was to be prosecuted by the United States at its own expense or by the respondents at the expense of the fund, and the United States consented to the latter course. Its consent goes to the *entire* expense—the lawyers and next friend as well as the stenographers, notaries, and printers, &c.

6. The fact that after its intervention the United States allowed and encouraged respondents to continue the prosecution of the suit down to its final conclusion, and accepted their help and co-operation even in the part which the United States nominally took in its prosecution (R. 107, 157, 158, 159), is a further and continuing consent by

it that respondents be paid out of the fund. That, indeed, is what its officers said (R. 159).

6. The District Court's final decree on the merits expressly retained jurisdiction *of the cause and of the property* for the purpose of thereafter determining applications for allowances (R. 97, paragraph 3), and the direction to return the fund to the Secretary was expressly made subject to that reservation (R. 97, paragraph 2). As expressed by the judge who made the decree, it "clearly implied that fees and expenses in connection with the suit were expected by counsel, and would be allowed by the court" and "no objection to such implication was expressed or taken" R. 162).

That failure to object was thus a further implied consent, and respondents acted upon it by continuing their services upon the Mission Society's appeal and application for certiorari.

POINT II.

The consent of the United States having been so given, it cannot be revoked.

Respondents' services having been rendered under circumstances which amounted to a consent on the part of the United States that they be paid for by an allowance by the court out of the fund, that consent cannot be revoked to respondents' prejudice after all the services have been rendered.

The situation has all the elements of an implied contract, which, of course, is just as binding and irrevocable as an express contract.

The situation is likewise analogous to a grant, and of course an executed grant cannot be revoked.

Consents, permits, licenses and offers, when acted upon by investing money or changing position, repeatedly have been held to be binding contracts which cannot be revoked.

New York Electric Lines v. *Empire City Subway*, 235 U, S. 179, 193;
Russell v. *Sebastian*, 233 U. S. 195, 204, 208;
Grand Trunk Western Ry. v. *South Bend*, 227 U. S. 544, 555-557;
Noble v. *Union River Logging Railroad*, 147 U. S. 165, 176.

In the case last cited it was held that a decision by the Secretary of the Interior that a certain railroad company was entitled to a right of way over public land could not be revoked by his successor in office.

Another applicable rule is that a party cannot assume successive positions in the course of a suit, or a series of suits, in reference to the same facts, which are inconsistent with each other. He will be confined to the position he first adopts.

Davis v. *Wakelee*, 156 U. S. 680, 689-691, and cases there cited;
Daniels v. *Tearney*, 102 U. S. 415, 421;
Bigelow on Estoppel, 6 ed. p. 732.

In *Davis* v. *Wakelee*, *supra*, the defendant was held precluded from asserting the invalidity of a concededly void judgment against him because in prior judicial proceedings he had asserted its validity.

That doctrine sometimes, but not always, is called estoppel; but whether called estoppel or by any other name, it clearly is applicable to the United States.

It would be applicable even if the United States were being affected in its capacity as sovereign, for the substantial considerations underlying the doctrine of equitable estoppel apply to sovereigns as well as to individuals, at least with respect to their position in judicial proceedings.

United States v. *Stinson*, 125 Fed. 907, 910 (C. C. A. 7th Circuit); aff'd 197 U. S. 200;

State v. *Jackson L. & S. R. Co.*, 69 Fed. 116, per TAFT, LURTON and SEVERENS, *JJ.*

"When the United States comes into court to assert a claim, it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter."

United States v. *The Thekla*, 266 U. S. 328, 339, 340.

Furthermore, the United States is not here asserting its sovereign rights. It is here merely asserting the rights of Barnett, a private citizen.

POINT III.

The order awarding expense money constitutes an adjudication of the right and power of the courts below to make allowances out of the fund, and is binding upon petitioner as *res adjudicata*.

The question here urged with respect to the power of the court over the fund having been expressly raised and actually decided upon the application for expense money (*supra*, p. 24), the order upon that application makes the question *res adjudicata*. And as petitioner was then a party to the cause and did not appeal from the order (although it was in its nature appealable, *Trustees* v. *Greenough*, 105 U. S. 527), the order is binding upon it.

The fact that petitioner did not then oppose or contest the order does not detract from the force of the adjudication (*Riehle* v. *Margolies*, 279 U. S. 218, 225; *Nashville &c. Ry. Co.* v. *United States*, 113 U. S. 261; *Masters* v. *City of Rainier*, 238 Fed. 827, 832).

Neither is there any merit in petitioner's argument that the order has no binding effect "save and except with respect to the $3,000 directly involved" (Brief, p. 29). The nature of all the allowances is the same, whether they go for legal services, stenographer's services, printer's bills, or what not, because all are comprehended within the single class of expenses incident to the recovery of the fund for Barnett. The fact that a different sum of money is involved is therefore immaterial.

In *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, the court rejected a contention that a judgment holding that

the bank was exempt from taxes for one year was not *res adjudicata* in a suit for taxes for a different year. The court said (p. 396):

> "The proposition that because a suit for a tax of one year is a different demand from the suit for a tax for another, therefore *res adjudicata* cannot apply, whilst admitting in form the principle of the things adjudged, in reality substantially denies and destroys it. *The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies.* This is the elemental rule, stated in the text books and enforced by many decisions of this court. A brief review of some of the leading cases will make this perfectly clear."

The court then reviewed prior decisions and quoted from *Cromwell* v. *Sac County*, 94 U. S. 351, 353, as follows (p. 397):

> "'But where the second action between the same parties is upon *a different claim or demand*, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to the matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question *actually litigated and determined* in the original action, not

what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

It then quoted from *Last Chance Mining Co.* v. *Tyler Mining Co.*, 157 U. S. 683, 687, as follows:

> "The law in respect to estoppel by judgment is well settled, and the only difficulty lies in the application of the law to the facts. The particular matter in controversy in the adverse suit was the triangular piece of ground, which is not the matter of dispute in this action. The judgment in that case is therefore not conclusive in this as to matters which *might have been decided*, but only as to matters which *were in fact decided*."

It then concluded (p. 398):

> "It follows, then, that the mere fact that the demand in this case is for a tax for one year and the demands in the adjudged cases were for taxes for other years, does not prevent the operation of the thing adjudged, if, in the prior cases, the question of exemption was necessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed."

In the case at bar, as already noted, the precise question here urged with respect to the power of the court over the fund was expressly raised, actually litigated, and in fact decided. The question is thus *res adjudicata*.

The effect of an adjudication as *res adjudicata* is not confined in its operation to subsequent independent actions or proceedings, but is equally applicable to all ancillary or

collateral proceedings in the same suit or action or general proceeding.

Freeman on Judgments, 5 Ed. § 627-a;
Tatlow v. *Bacon*, 101 Kans. 26; 14 A. L. R. 269; writ of error dismissed, 251 U. S. 537;
Estate of Bell, 153 Cal. 331; 95 Pac. 372;
White v. *Ladd*, 41 Ore. 324; 68 Pac. 739;
Overlander v. *Overlander*, 235 Pac. 93 (Kans.);
State v. *Randazzo*, 300 S. W. 755 (Mo.).

It is to be noted, too, that the final decree on the merits likewise amounts to an adjudication of the power of the court to make allowances, because it expressly made the return of the fund to the Secretary *subject* to such allowances as the court should thereafter make out of the fund (R. 97). If the court were without power to make any allowances, then that part of the decree which made the return of the fund subject to allowances was adverse to petitioner, and petitioner could and should have appealed from that part of the decree within three months after it was rendered. There was no occasion for waiting (unless there is to be attributed to petitioner the unworthy motive of desiring that respondents assume the burden of upholding the decree as against the appeal of the Mission Society before it stunned them into insensibility by a contention that they could not be paid for their services), for if there could be no allowance at all, it was futile to wait and see how much of an allowance the court would make.

Having failed to appeal from that part of the final de-

cree which made the return of the fund subject to allowances, petitioner cannot now attack that provision or be heard in opposition to it.

POINT IV.

The Secretary removed the restriction on alienation, and that act of the Secretary was not and has not been held to be void.

A reading of the Act of May 27, 1908, quoted at pages 2, 3, 4 of petitioner's brief, will show that the entire jurisdiction and power of the Secretary is limited to two things: *He may remove restrictions, and he may approve or disapprove leases.* The gift here in question certainly was not a lease. Therefore, the Secretary's approval of the gift—followed, of course, by his surrender of his custody of the bonds—could not have been anything other than a removal of the restriction. He thereby consented to an alienation, which is what a removal of the restriction amounts to.

This much we do not understand petitioner to controvert, and, in any event, it would of course be absurd to say that the fund was still restricted after the Secretary himself voluntarily had relinquished his custody and turned the bonds over to the Trust Company under a trust under which they would eventually go to the Mission Society.

The gist and point of petitioner's argument is that the District Court, in deciding the merits of the case, ruled that the Secretary's act was *void*, and, therefore, the restriction never was removed, despite the Secretary's attempt to remove it, and the fund thus always remained and

now is restricted against any alienation without a new approval or consent by the Secretary. That thought is asserted in various forms throughout petitioner's brief—the idea that the Secretary's act was found by the court to be *void* being asserted at pages 20, 21, 22, 23, 25, 26 and 27.

The underlying basis of the argument is thus untenable, for, as pointed out at pages 12-18, *supra*, the court, in deciding the merits of the case, *did not rule that the Secretary's act was void but, on the contrary, assumed it to be valid.* We already have analyzed its opinion and need not repeat what has been said, but a reference to the cases which the District Court cited—*Jennings* v. *Wood*, 192 Fed. 507, and *Kendall* v. *Ewert*, 259 U. S. 139—will emphasize the point.

In *Jennings* v. *Wood*, a lease by a minor allottee of the Cherokee tribe which had been approved by the Secretary was cancelled on the ground that a minor is incapable of contracting, the point decided being that the Secretary's approval could not give validity to a lease that was void because of contractual incapacity of the parties to it. In *Kendall* v. *Ewert*, a conveyance by a mentally incompetent Indian was adjudged void because of his mental incapacity although the conveyance had been approved by the Secretary. In neither of those cases was there any question about the power or authority of the Secretary and no suggestion that his act was irregular or void or voidable. The decisions simply proceeded upon the ground that the Secretary's approval, although regular and valid in itself, was nevertheless ineffective to make valid a conveyance which was void because of the contractual incapacity of the par-

ties to it; and that is the same ground upon which the District Court proceeded in the case at bar.

In other words, the gift in the case at bar (like the conveyances in *Jennings* v. *Wood* and *Kendall* v. *Ewert*) were set aside, *not because the Secretary did not remove the restrictions, but despite the fact that he had removed them.*

Petitioner also stresses the fact that the court returned the fund to the Secretary. It asserts that *the fact of such return* "stands as a conclusive decision that the restrictions had not been removed by the Secretary" (p. 22) or "plainly implied that it (the court) was of the opinion that the fund was a restricted fund" (p. 25). We think that argument a complete *non sequitur*. The court could not turn the fund over to the physical custody of Barnett. No guardian was before the court asking for its custody. The fund had to go somewhere; and it was not an absurdly strange or unnatural thing for the court to send it to the official charged by Congress with the custody of Indian funds—even though he had not proved a very efficient or faithful custodian of this particular fund in the past. The court may have thought that with the admonitions of its decision that official would do better in the future. At all events, petitioner certainly cannot ask this court to construe the return of the fund to the Secretary as indicating a ruling that restrictions had not been removed when the same judge who directed that return specifically asserts, with the point brought to his attention, that the Secretary "saw fit to release the supervision over the disposition of the fund which had been committed to him by Congress" (R. 162). However often this court may differ from the District Judges on questions of law and fact, it hardly will

differ from what one of them says his own ruling means. It will not construe a ruling differently from the way the judge says he meant it. That is what petitioner is asking the court to do when it asserts that the fact of the return of the fund to the Secretary means that the District Court ruled that restrictions had not been removed.

We do not know of any justification for petitioner's position that the Secretary "could not hold any funds except restricted funds" (p. 22) and cannot "again receive possession of a fund after he has validly released restrictions" (p. 23). But if that view be right, we suppose the Secretary will decline to receive the fund and the court will have to find another custodian.

Whether or not, if and when the Secretary receives the fund back in its possession, the fund will then again become restricted—in other words, whether or not the court's direction for the return amounts to a reimposing of the restrictions—is a question which it is not necessary at this time to determine.

POINT V.

The fund was subject to allowances by the court even though the restriction on alienation had not been removed.

Let us now assume that the restriction on alienation never had been removed. Even upon that assumption, the allowances are proper.

A.

Inalienability or Immunity of Property Does Not Defeat the Right or Power of a Court Having Jurisdiction Over It to Subject It to Claims for Recovering or Preserving It.

The case of *Kendall* v. *Ewert*, 259 U. S. 139, 149, was cited by both courts below (R. 162, 178), and is, we submit, an authority supporting their decision. In that case the suit was brought by an Indian against one to whom he had conveyed his *restricted* land, and the relief prayed for was a decree that the grantee held the land in trust for the Indian. The Indian died and the suit was revived in the name of his administrator and heirs. The heirs then settled with the grantee, and it was contended that an appeal by the administrator should be dismissed for the reason that he was not competent to prosecute it. The argument, as stated by this court, was that "the land involved continued *under restriction* until September 26, 1921, that neither it nor the royalties issuing therefrom could be incumbered until that date, and that both passed to the heirs so *freed from charges of any kind* that there was no property or estate for an administrator to administer and no function for him to perform." In rejecting that argument this court said (p. 149):

> "With this we cannot agree.
>
> "The petition in the case prayed for recovery of the land and also for an accounting for rents and profits. That Redeagle or his heirs could institute such a suit is not disputed *and to maintain it he must employ counsel and create court costs which should be paid.*

> The record shows that large sums in royalties for zinc and lead ores mined from the lands involved had been paid to Ewert, and these when accrued were clearly personal property (United States *v.* Noble, 237 U. S. 74, 80), which, on the death of Redeagle, would pass to his administrator for purposes of paying any inheritance or other taxes which might be properly chargeable against it, *and for other administration charges* and for distribution."

In *Winton* v. *Amos*, 255 U. S. 373, 393, the court stated that the principle upon which courts of equity award compensation out of a fund to counsel who have recovered or benefited the fund is *analogous to the salvage services of the maritime law.* The numerous cases in which claims for salvage services have been sustained and enforced against *property owned by a sovereign* thus, also, sustain the right of the courts below to make the allowances in this case, even though the fund in question were in truth restricted; for the restriction against alienation without the Secretary's approval certainly is no stronger and no more sacrosanct than a sovereign's immunity.

Among the cases of that kind, special attention is called to *The Davis*, 10 Wall. 15, in which property of the United States was subjected to a claim for salvage services despite the sovereign's immunity from suit and despite the fact that the claim could not have been enforced by suit *in rem* against the property if it had been necessary, in order to enforce the claim, to take the property out of the possession of the government by any writ or process of the court. This court stated that when property of the government

has been saved from destruction by salvors, "justice and sound policy require that it should be held to bear its share of the burden which the unanimous voice of maritime nations imposes on all other property in like condition" (p. 19); and the court held that as the property was not in the possession of the government (having been seized by the marshal under the libel while in the possession of the vessel which had contracted to carry it for the United States) the court could and should "enforce the lien of the libellants for the salvage *before it restored the cotton to the custody of the officers of the government*" (p. 22). The court also pointed out that by possession it meant *actual* possession, and not merely constructive possession implied from ownership, and that as the court could enforce the claim for services without "bringing the officer of the court into collision with the officer of the government, if the latter should choose to resist" (p. 22), the court had jurisdiction to enforce the claim.

Other cases to the same effect are:

United States v. *The Thekla*, 266 U. S. 328;
The Siren, 7 Wall. 152;
In re United States Steel Products Co., 24 Fed. 2d, 657 (C. C. A., 2d Circuit).

Those cases, we submit, authoritatively establish that, even if it be assumed that the fund here in question was restricted and could not have been subjected to claims for attorneys' services if the fund were in the actual possession of the Secretary, yet, inasmuch as it was *not* in the actual possession of the Secretary, the claim for services may be enforced by the courts, and that it was the duty of the

courts to enforce it before restoring the fund to the Secretary.

As stated by both courts below, the fund passed out of the possession of the Secretary and court action was necessary to get it back (R. 162, 178). Petitioner, by its intervention in respondents' suit, joined with respondents in endeavoring to get it back; and as was said by this court in *United States* v. *The Thekla, supra*, at pp. 339, 340:

> "When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter. The absence of legal liability in a case where but for its sovereignty it would be liable does not destroy the justice of the claim against it. When the question concerns what would be paramount claims against a vessel libelled by the United States were the vessel in other hands, the moral right of the claimant is recognized."

The restriction against alienation without the Secretary's approval was imposed by Congress in order to protect the Indians from despoilers, and not to enable them to avoid just claims for services in recovering their property where the Secretary himself has failed to protect them.

As the property of the United States itself may be subjected to claims for services in salvaging it, there is no reason why the property of Indians may not be subjected to similar claims even though the Indian himself may have no right to convey or encumber it.

Attention is also called to *New York Dock Co.* v. *S. S. Poznan*, 274 U. S. 117, in which a claim for wharfage of a

vessel *in custodia legis* was allowed as a preferred claim upon the proceeds of the vessel. The court there stated that such a claim should be allowed as an "expense of justice" without regard to any equitable or maritime lien in a technical sense. The principle of that case, as well as much of the language in the opinion (pp. 121, 122), is applicable here.

B.

THE FUND IS SUBJECT TO ALLOWANCES BECAUSE IT IS A TRUST FUND AND A COURT OF EQUITY HAS POWER TO CONTROL THE CONDUCT OF A TRUSTEE OF SUCH A FUND.

The same result which the courts have reached in the preceding cases will also be reached if the matter be approached from a different angle.

Barnett is the owner of the bonds and the Secretary, as an official of the United States, is merely a trustee. And under existing law the restriction will expire and the trusteeship will end in April 1931.

The trusteeship of the Secretary does not have all the elements of a private trust, in that the Secretary is a self-appointed trustee, and the trust is terminable at his will (*U. S. Fidelity & Guaranty Co.* vs. *Hansen*, 36 Okla. 459; 129 Pac. 60); and while it has been held that the Indian, or his representative, cannot arbitrarily compel the Secretary to surrender *all* the funds belonging to him (*Parker* vs. *Richard*, 250 U. S. 235), it never has been held that the courts are powerless to compel the Secretary to apply a reasonable portion of the Indian's funds for his benefit, and we do not apprehend that any court ever will so hold.

Suppose, for example, that Barnett had ample funds in the hands of the Secretary but nothing with which to buy food, and that the Secretary refused to release any part of his funds to him for the purpose of his support. Could it be said that the courts are powerless to so control the discretion of the Secretary as to compel him to surrender to Barnett, or to his representative, a reasonable amount of his funds? The question answers itself. The courts do have power to prevent such an arbitrary abuse of discretion. The Secretary, in the administration of these trust funds, is subject to the control of a court of equity in the same manner and to the same extent as a trustee of a private trust. In each instance, the court will not ordinarily interfere with the discretion of the trustee, but will do so if he act arbitrarily or capriciously or abuse his discretion.

While we have referred to the Secretary as the trustee, the real trustee is the United States. (*U. S. F. & G. Co.* vs. *Hansen, supra*). The court thus had jurisdiction of the parties, including the trustee by its own intervention, and of the funds out of which the allowance was requested. What, then, were the powers of the court below, sitting as a court of equity, to break in upon this trust and direct the payment of the expenses of this litigation?

There are numerous cases on the subject, of which *Bennett* vs. *Nashville Trust Company* (Tenn.), 153 S. W. 840; 46 L. R. A. (N. S.) 43, is a type. In that case, a will had directed the executor to hold $1,000., with all accumulations, until a certain infant had attained the age of twenty-five years, when said sum, with all accumulations, was to

be paid to her. While still a minor, the beneficiary filed a bill, by a next friend, setting forth that she needed the money to complete her education, and it was held that a court of equity had power in the interest of the infant to break in upon the terms of the trust and permit the beneficiary to use the income in advance of her becoming twenty-five years of age. In a note to the case as reported in 46 L. R. A. (N. S.) 43, many other cases to the same effect are collected. The author of the note says (p. 44):

"The cases all agree that where peculiar circumstances have arisen not expressly provided for by the trust instrument, and not anticipated by its author, the court in the emergency that has arisen has jurisdiction to sanction acts by the trustees which in ordinary circumstances they would have no power to do."

Also, at pages 45, 46:

"It has also been held in numerous instances that equity may make an allowance out of the income of a trust estate for the support of an infant *cestui que trust* although the instrument creating the trust contains no provision for maintenance and there is a direction that the income shall accumulate.

Also at page 51:

"Where there is an absolutely vested gift made payable at a future event, as upon the legatee's attaining a certain age, or upon the decease of an annuitant, with a direction to accumulate the income in the meantime and pay it with the principal, the court will not enforce the trust for accumulation, in which no person has any interest but the legatee."

Quoting from *Stephens* v. *Howard*, 32 N. J. Eq. 244, it said (p. 45):

> "The source of the power is easy to trace. It is found in the fact that the infant is the absolute owner of the property, no other person having either a present or prospective legal interest in it; and that, if the present enjoyment of the property is withheld, the infant must suffer, possibly for the advantage of some person who has no interest in the infant and was never thought of by the testator as a possible recipient of his bounty."

At page 49 it is said:

> "While the power of courts of equity to hasten enjoyment of a trust fund is most frequently exercised for the benefit of infants, it has also been exercised in other cases where the exigencies of the situation have seemed to demand it."

The rule applies where the beneficiary, although of full age, is feeble minded (*Longwith* v. *Riggs*, 123 Ill. 258, 14 N. E. 840).

It is true that in some of the cases the reason for the court's breaking in upon the terms of the trust is said to be that the creator of the trust would have authorized such action had he anticipated such emergency, whereas here the Secretary was appraised of the emergency and yet refused to authorize the requested use of the funds. That, however, is immaterial. The important thing is that the cases cited show that it is *within the power of a court of equity* to break in upon the terms of the trust whenever a *proper case* is presented; and the case at bar really is a

stronger case in favor of the existence and exercise of this power of the court than the cases which we have cited, *because the beneficiary here has been obliged to prosecute this suit to undo a wrongful and illegal act on the part of the trustee.*

The feature is vividly brought out in the opinion of Judge KNOX at R. 160, 161.

It would be absurd to say that courts of equity have power to permit trust property to be used in contravention of the terms of a trust in order to enable the beneficiary to go to school and yet have not the power to permit the funds to be used in contravention (as we now assume for purpose of argument) of the terms of the trust in order to defray the *expenses of a suit to recover property wrongfully dissipated by the trustee;* and it would be a travesty to say that the power is lacking *merely because the trustee does not wish the funds to be so used.*

Moreover, there is no requirement of any law that the Secretary of the Interior hold these funds for any particular length of time, and hence it is not necessary in this case to go to the extent held proper by the foregoing authorities, namely, to break in upon the terms of the trust. It is only necessary here to control the discretion of the trustee to prevent an abuse thereof. This the court below had undoubted power to do (*Keeler* v. *Lauer* (Kans.), 85 Pac. 541). In that case a testamentary trust authorized the trustee to sell property and re-invest the proceeds and to apply such part of the estate as he deemed appropriate to the maintenance and education of the children of the testatrix, and the court said (syllabus):

"Notwithstanding the powers and discretion given to the trustee, he is subject to the direction and control of a court of equity, which will have full power to prevent mismanagement of the estate and to correct any abuses of the trust."

See, also, note on this subject in 8 L. R. A. (N. S.) 398.

The fact that the trustee in this instance is an officer of the United States Government does not exempt him from the control of the courts in a proper case, namely, to prevent acts which are arbitrary, capricious, or an abuse of discretion.

Work v. *Rives*, 267 U. S., 175, 183, 184.

C.

COURTS OF EQUITY HAVE A SPECIAL DUTY TO PROTECT THE RIGHTS OF INCOMPETENTS, AND FROM THAT DUTY THERE FLOWS THE CORRELATIVE POWER.

It being established that these funds are subject to the control of a court of equity, despite the existence of the restrictions, it only remains to point out that a court of equity always is under a special duty to protect the rights of an incompetent in any case which comes before it to which the incompetent is a party. That is so well settled that we shall here do no more than call attention to *Edwards* vs. *Edwards*, 14 Tex. Civ. App. 87, in which allowances were made to the next friend and his attorneys out of the fund there in litigation. In that case the court made the following significant remark (p. 92):

"So as to the allowances, if litigation of this class

must be undertaken by a next friend at his own expense, a court of equity being denied the power of doing full justice to all parties by its decree, such next friend would likely be deterred from often undertaking so kindly and costly a service for an unfortunate victim of infirmity and fraud."

It is the *duty* of a court of equity to make all orders necessary to protect the rights of an incompetent; and in *Heckman* vs. *United States*, 224 U. S. 413, 437, the court, in discussing the power of the United States to sue on behalf of an Indian ward, said: ". . . . there arises the *duty* of protection and *with it the power.*"

The same thing may be said here—from the duty there flows the *power* to perform it.

POINT VI.

Respondents have a lien upon the fund, and are entitled to an allowance out of the fund for that reason.

The settled doctrine that expense incurred and services performed in recovering a fund may be reimbursed and compensated by allowances made by the court out of the fund recovered, is applicable here and affords a sufficient basis for the allowance.

Trustees v. *Greenough*, 105 U. S. 527;
Central Railroad and Banking Co. v. *Pettus*, 113 U. S. 116;
Winton v. *Amos*, 255 U. S. 373, 391, 392, 393;
United States v. *Boyd*, 79 Fed. 858;
Colley v. *Wolcott*, 187 Fed. 565.

The most usual application of the doctrine is in cases where one sues for the benefit of a class, but it is equally applicable where one plaintiff alone sues on his own behalf.

Harrison v. *Perea*, 168 U. S. 311, 325.

The attorney's right to be compensated for his services is in the nature of, and is treated as, a lien upon the fund recovered.

In re Paschal, 10 Wall. 483, 493;
In re Baxter & Co., 154 Fed. 22, 24 (C. C. A., 2nd Circuit);
Ingersoll v. *Coram*, 211 U. S. 335, 368.

In addition to that equitable doctrine, the right here is fortified by the New York statute, which provides (*Judiciary Law*, § 475, formerly Code Civ. Proc., § 66):

"§ 475. *Attorneys' lien in action or special proceeding.* From the commencement of an action or special proceeding, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, decision, judgment or final order in his client's favor, and the proceeds thereof in whosoever hands they may come; and the lien can not be affected by any settlement between the parties before or after judgment or final order. The court upon the petition of the client or attorney may determine and enforce the lien."

That statute is not a mere practice act. It establishes a substantive right and is controlling on the Federal courts sitting in New York and may be enforced in such courts.

In re Baxter & Co., 154 Fed. 22 (C. C. A., 2nd Circuit);

Meighan v. *American Grass Twine Co.*, 154 Fed. 346 (C. C. A., 2nd Circuit).

In Oklahoma, also, attorneys are given a similar lien by Section 4100 of Oklahoma Compiled Statutes, 1921.

The court having control of the fund is to provide for that lien before surrendering its control.

Tuttle v. *Claflin*, 88 Fed. 122, 124, 125 (C. C. A. 2nd Circuit).

THE CONTENTION THAT THE ALLOWANCES ARE ERRONEOUS BECAUSE RESPONDENTS DID NOT PERFORM CERTAIN FEE CONTRACTS TO WHICH PETITIONER REFERS IS NOT OPEN FOR REVIEW HERE, AND, IN ANY EVENT, IS WHOLLY UNTENABLE.

Apart from the question as to restrictions on alienation, the power of the Court to make the requested allowances was not challenged either in the District Court (R. 141, 142) or in the Circuit Court of Appeals (R. 169, 170), or in the petition to this court for the writ of certiorari.

Under those circumstances, the new point which petitioner now makes at pp. 31-36 of its brief, is not open for consideration.

Alice State Bank v. *Houston Pasture Co.*, 247 U. S. 240;

Webster Co. v. *Splitdorf Co.*, 264 U. S. 463, 464;

Steele v. *Drummond*, 275 U. S. 199, 203;

Commercial Credit Co. v. *United States*, 276 U. S. 226, 229, 230.

But if considered it will be found to be wholly untenable.

As already pointed out, respondents never prosecuted this case under those contracts (*supra*, p. 11), and certainly neither of the courts below based their decisions upon them. It is true, of course, that respondents got into the case because Bailey, the then guardian, had retained Hummer & Foster as his attorneys and Hummer & Foster got the other respondents to assist them (R. 113-115; 137; 102). Respondents were not intermeddlers and their services were not intended to be gratuitous (*Winton v. Amos*, 255 U. S. 373, 394), but the suit was not brought by the guardian or in a jurisdiction where, as such, he had a right to sue.

The idea which petitioner seems to be trying to get into the mind of the court by presenting this point is that respondents did not win the case. To do that it is asserted in various places and by various forms of expression that the object of the bill filed by respondents was to get the bonds for Bailey, as guardian, and that that object failed (Brief, pp. 32, 33, 38). The plain answer is that the bill prayed for a return of the bonds to Barnett, the plaintiff (R. 13).

The object of the suit was to get the bonds back *for Barnett as his property*, and that is what was accomplished. Actual physical custody or possession was of comparatively little moment.

Moreover, the case was actually won upon respondents' theory and not upon the theory upon which petitioner elected to go to trial. By withdrawing, at the opening of the trial, its allegation that the Secretary's amendatory

regulation of October 7, 1922, was invalid (R. 83), petitioner conceded the Secretary's power to pay out an Indian's money in any way he thought was "for the benefit" of the Indian and thus left the case in peril of its being decided that a court cannot review a Secretary's determination as to what is for an Indian's "benefit."

But even if respondents had prosecuted this case under a contract, and even if they had failed to perform that contract literally and according to its terms, or even if the contract were invalid, they nevertheless would be entitled to compensation out of the fund because they actually benefitted and were instrumental in recovering the fund for the owner of it.

In *Winton* v. *Amos*, 255 U. S. 373, 393, the court, in sustaining the right of attorneys to compensation out of Indian funds, said:

> "The fact that in the present case the services were rendered under contracts with particular Indians, whether valid or invalid, is no obstacle to a recovery. Services not gratuitous, and neither *malo in se* nor *mala prohibita*, rendered under a contract that is invalid or unenforceable, may furnish a basis for an implied or constructive contract to pay their reasonable value."

And although there were specific contracts in that case this court applied the equitable doctrine of charging the fund with the cost of the services which benefitted it.

To the same effect is *McGowan* v. *Parish*, 237 U. S. 285,

299, 300, which related specifically to attorneys' fees and where the contract was not literally performed; and the same principle was applied in *New York Central R. R. Co.* v. *Gray*, 239 U. S. 583.

In fact, it is a well-settled doctrine that where a contract, not *malum in se* or actually void because contrary to public policy, is or becomes unenforceable because prohibited by or not in exact conformity with some statute or because not fully performed, there nevertheless may be a recovery for services rendered or property delivered under the contract.

> *Hill County* v. *Shaw & Borden Co.*, 225 Fed. 475 (C. C. A. 9th Circuit);
> *Stephens* v. *Phoenix Bridge Co.*, 139 Fed. 248 (C. C. A. 2nd Circuit);
> *City of St. Charles* v. *Stookey*, 154 Fed. 772, 776, 777 (C. C. A. 8th Circuit). Certiorari denied, 208 U. S. 617.

In such cases the contract is evidence establishing the reasonable value of the services rendered.

> *City of St. Charles* v. *Stookey*, *supra*, at p. 777;
> *Ludlow* v. *Dole*, 62 N. Y. 617;
> *Rubin* v. *Cohen*, 129 N. Y. App. Div. 395, 397;
> *Hollander* v. *Kaufman*, 172 *id.* 218;
> *Boyd* v. *Vale*, 84 *id.* 414, 416;
> *Jeffery* v. *Walker*, 72 Hun 628, 631.

Upon the authority of those cases we urged upon the District Court that it *very well might* follow the contract which Hummer & Foster had made with the guardian *as a*

measure of the allowance, although we conceded that the contract had no binding effect. The District Court refused to do that, however, and fixed the allowance *at the amount which in its judgment seemed fair and reasonable* (R. 162).

POINT VII.

The amount of the allowances should not be disturbed.

As petitioner has not brought the entire record to this court—the evidence taken, the briefs prepared, and the proceedings upon the trial, being omitted—we submit that this court necessarily is so precluded from knowing either the extent or value of the services rendered by respondents that petitioner is in no position to ask that the amount of the allowances be reviewed.

Under these circumstances, this court will presume that the decree, in so far as it stands upon the question of amount, is supported by the evidence.

Zimmerman v. *Harding*, 227 U. S. 489, at p. 496;
Carson v. *Hurt*, 250 Fed. 30, 33 (5th C. C. A.);
Pappas v. *Baltimore & Ohio R. Co.*, 37 Fed. 2d, 271, 272 (6th C. C. A.).

Furthermore, both courts below certainly are in agreement that the amounts finally allowed are *not excessive;* and in *United States* v. *Carter*, 217 U. S. 286, 319, 320, this court said with respect to an allowance out of a fund:

> "So far as the amount of the allowance is concerned we do not feel authorized to disturb it, as two

courts in succession have concurred in the amount allowed as reasonable."

It may be mentioned in passing that in that case counsel was allowed a fee of $60,000 in a case in which he was unsuccessful and in which there was no element of contingency.

If, despite the foregoing, the court feel inclined to go into the question of amount, we call attention to the following considerations.

Petitioner's naïve description of the case and of the services, at pages 38 and 39 of its brief, is so lacking in correlation with the facts that we pass it without comment, except to say that if respondents "neglected" to call Barnett as a witness, then petitioner itself was guilty of the same neglect. Before the conflict had terminated in victory, petitioner had concurred with respondents that it was good strategy to procure Barnett's presence upon the trial and put those who asserted his competency in the position of refusing to call him (R. 107, 108, 157, 91).

As to the nature and extent of the services actually rendered, the best we can do, in the absence of the entire record, is to refer the court to respondents' affidavits at R. 101-141, 154-160, and to the opinions of the District Court at R. 84-96 and 160-163.

Four firms have been engaged upon the litigation for substantially five years. From June, 1924, to February, 1927, Mr. Foster was engaged upon the matter for three-fourths of his working time, which means about 600 days (R. 113). From January, 1925, to January, 1927, Mr. Walter devoted to the case approximately one-third of his work-

ing time, which means about 200 days (R. 102). In addition, there were other services by other members of Mr. Walter's firm and by lawyers in its employ (R. 102); and also the services of Mr. Cochran (R. 137-141) and the help rendered by Mr. McCrory. There were, also, the following services subsequent to final submission of the case to the District Court in January, 1927, *viz.*: Preparation and entry of the final decree, the dismissal of the Mission Society's appeal, and the successful opposition to its petition for a writ of certiorari.

If those services had been performed for a competent and solvent client, without any element of contingency, $125 per day certainly would be reasonable; and on that basis the services of Mr. Foster and Mr. Walter alone, down to January, 1927, would call for an allowance of $100,000. Doubling that amount because of the hazard and contingency, those services alone would call for an allowance of $200,000.

In *Newton* v. *Consolidated Gas Co.*, 259 U. S. 101, this court allowed $49,250 for 282 days' work (which is at the rate of $175 per day) for the services of a Special Master in a matter which involved no element of risk or contingency. At that rate, the services of Mr. Foster and Mr. Walter alone, down to January, 1927, would call for an allowance of $140,000, and doubling that amount because of the hazard and contingency would make $280,000.

Looking at the matter from a percentage standpoint, the allowance of $100,000 is but slightly over fifteen per cent., even upon the Circuit Court of Appeals basis of computing the amount involved (R. 179, 180); and we respectfully submit that never yet have counsel been cut down to

such a low percentage in any contested case taken upon a contingent basis. Persons *sui juris* constantly contract for a much larger percentage, and we submit that there is no reason why the courts should ignore that usual business practice and require that incompetents be served for less than competent clients usually agree to pay. Even in simple negligence cases, requiring but little time and presenting no unusual difficulty, contracts for much larger percentages of the recovery are customary, and much larger percentages constantly are being awarded by the courts in cases where infants are involved.

In *Hodgman* v. *Atlantic Refining Co.*, 8 Fed., 2d, 777, the District Court in Delaware allowed one-third of the recovery up to $500,000 and ten per cent. of the excess up to $1,000,000 and five per cent. of the excess above $1,000,000.

In *Grant* v. *Fletcher*, 283 Fed. 243, 274, the District Court in Michigan awarded fifty per cent. of the recovery.

In *Frink* v. *McComb*, 60 Fed. 486, decided as long ago as 1894, an allowance of one-third of the recovery, with interest, in addition to expenses, was made by Judges WALES and DALLAS.

We submit that the Circuit Court of Appeals in this case has erred on the side of caution and illiberality rather than on the side of excess.

We submit, also, that the Circuit Court of Appeals erred, as matter of law, in ruling that the services rendered in the litigation in Oklahoma cannot be paid for out of the fund here involved (R. 178, 179). While respondents of course cannot urge that error for the purpose of increasing the allowance, because they have not applied for a cer-

tiorari, they may urge it as an additional reason justifying the allowance.

> "It is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party * * *. But it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it. By the claims now in question the American does not attack, in any respect, the decree entered below. It merely asserts additional grounds why the decree should be affirmed. These grounds will be examined."
>
> *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435, 436.

The reasoning of the Circuit Court of Appeals with respect to respondents' services in the litigation in Oklahoma was that neither a revocation of Bailey's letters of guardianship nor the granting of a writ of prohibition by the Supreme Court of Oklahoma would have prevented the prosecution of this suit, because if Bailey had been ousted or prohibited the District Court could and would have substituted another *prochein ami* or the United States might have proceeded with this suit alone, and therefore respondents' resistance to the writ of prohibition and the attack upon the guardianship did not aid in winning this case (R. 178, 179). It was easy for a court of last resort to assert that after the litigation was over; but though that was

respondents' own view at the time (R. 120) we submit that no one could be sure that that view would be taken until after the court had spoken, and that it would have been gross carelessness for respondents to have allowed the Oklahoma litigation to go by default.

Moreover, the Circuit Court of Appeals overlooked the real purpose which respondents' opponents sought to obtain in the Oklahoma litigation. The attack upon the validity of the guardianship involved a great deal more than merely a continuance of Bailey's status as guardian, and resistance to the attack was not inspired by a mere desire to preserve the validity of the contract of Hummer & Foster with the guardian as the Circuit Court of Appeals seems to suggest. The appointment of the guardian involved *an adjudication of Barnett's mental incompetency*, and one of the points relied upon by respondents was that that adjudication was *conclusive* and in itself established the invalidity of the gift as matter of law. *The purpose of the attack upon the validity of the guardianship was to get rid of that conclusive adjudication—not merely to get rid of Bailey;* and the purpose of respondents' opposition to the attack was to preserve the adjudication because of the help the adjudication gave in winning this suit. The validity of the guardianship also had an important bearing upon the capacity of the United States to prosecute in Barnett's behalf (so important that petitioner joined with respondents in resisting the attack upon it), because the right of the United States to maintain a suit in behalf of an Indian whose property has been gotten away from him had been said by this court to be limited to cases where the conveyance was in violation of restrictions imposed by

Congress (*Bowling* v. *United States*, 233 U. S. 528, 534; *United States* v. *Waller*, 243 U. S. 452, 462, 463), and as the Secretary of the Interior had approved the gift there was a serious question whether there was any violation of a Federal restriction if there were no guardianship. The theory of the United States' petition of intervention in this case was that *the guardianship itself was a Federal restriction* (R. 50, 64-66, 72, 74, 80),* and in resisting the attack upon the validity of the guardianship respondents were endeavoring to prevent a situation which might lead to the conclusion that the United States had no authority to prosecute this suit.

The petition to the Oklahoma Supreme Court for a writ of prohibition likewise involved a great deal more than the mere ability of Bailey to proceed with this suit. That petition proceeded upon the theory that the power and jurisdiction of the Secretary of the Interior over Barnett's funds were *exclusive* and that his acts with reference thereto could not be questioned by any court (R. 120, 121; 133); and while the *surface* question in that case was whether or not *Bailey* could prosecute this suit, *the underlying and controlling legal question was whether or not* ANYBODY *could prosecute it*. What respondents were faced with, therefore, was the possibility of an adjudication that would tear this case up by the roots. True, the District Court in New York *might* have refused to follow a deci-

*Numerous cases recognize and assert that the Oklahoma County Courts in exercising their jurisdiction over Indians are Federal agencies. *Parker* v. *Richard*, 250 U. S. 235, 238, 239; *United States* v. *Gypsy Oil Co.*, 10 Fed. 2d 487, 491, 492; *Chisholm* v. *Creek & Indiana Dev. Co.*, 273 Fed. 589, 594, affirmed 282 Fed. 93, reversed in part 264 U. S. 488; *Priddy* v. *Thompson*, 204 Fed. 955; *Truskett* v. *Closser*, 236 U. S. 233; *Barbre* v. *Hood*, 238 Fed. 658, affirming 214 Fed. 473; *Kichen* v. *Cheney*, 235 Fed. 104.

sion of the Supreme Court of Oklahoma, but, on the other hand, it conceivably might defer to it, or even hold it to be absolutely binding as *res adjudicata*, inasmuch as Barnett and the United States and Bailey were all parties to the prohibition suit. Would not respondents, therefore, have been grossly negligent if they had failed to resist the prohibition suit?

This litigation in Oklahoma was exceedingly complicated and difficult, and the services rendered by respondents in it were exceedingly extensive and prolonged and of a high order (R. 119-124, 131-136), and they were successful in defeating the petition for the writ of prohibition (R. 124).

It is of course obvious that the allowances will not cause Barnett any hardship. When the gifts were made they represented practically all his accumulated royalties, but it appears from the testimony of Commissioner Burke upon the trial herein that in October, 1926 (three and one-half years after the making of the gifts) the Secretary of the Interior had in his custody belonging to Barnett nearly $400,000, and that Barnett's allotment was still yielding him royalties at the rate of $2,000 per month (S. M. of Trial, p. 354). In a statement before the Senate Committee on Indian Affairs on January 13, 1928 Commissioner Burke stated that Barnett then had an income from all sources of $68,000 a year.

The property which is now to go back to Barnett as a result of this suit is well over $600,000, *after all allowances*

are paid (the $511,795.83 set forth at R. 168 plus $84,881.08 taken from the District Court's allowances by the Circuit Court of Appeals and plus interest since the decree was made), and he thus has over $1,000,000 besides his 160 acres of oil-producing land.

It is also significant that the amount which goes back to Barnett as the result of the suit, *after all allowances are paid*, is more than $50,000 in excess of the value of the fund at the time it was given away. In other words, the allowances do not equal, and are thus entirely paid out of, the interest which has accrued upon the bonds during the pendency of the litigation. The original principal given away remains intact and has in fact increased.

Conclusion.

The decree should be affirmed.

Respectfully submitted,

JOHN W. DAVIS,
Counsel for all Respondents to whom allowances were made

April, 1930.

SUPREME COURT OF THE UNITED STATES.

No. 21.—October Term, 1930.

United States of America, Petitioner, *vs.* Equitable Trust Company of New York, et al.	Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[June 1, 1931.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This writ brings under review a supplemental decree making allowances for attorney fees, expenses, etc., in a suit, instituted by a next friend, to recover and preserve a trust fund belonging to Jackson Barnett, an incompetent Creek Indian, and directing that the allowances be paid from that fund. The allowances are challenged by the United States as in conflict with existing restrictions on the disposal of the trust fund, and as excessive.

Barnett is a full-blood Creek Indian, so enrolled, who received an allotment out of the Creek tribal lands when they were divided in severalty pursuant to congressional legislation.[1] By that legislation and an amendatory act[2] his right and title under the allotment and the ensuing patent were subjected to restrictions against "alienation, contract to sell, power of attorney, or any other encumbrance" prior to April 26, 1931,[3] save in virtue of a full or partial removal of the restrictions by the Secretary of the Interior, and against leasing for oil, gas or other mining purposes, save with the approval of that officer.

In 1912 the probate court of the county of Barnett's residence, in Oklahoma, adjudged him a mental incompetent and appointed a guardian of his estate. Later in that year Barnett and the guardian (the former described as "an incompetent"), with the approval of that court and of the Secretary of the Interior, executed to one

[1] Acts March 1, 1901, c. 676, 31 Stat. 861, and June 30, 1902, c. 1323, 32 Stat. 500.

[2] Act May 27, 1908, c. 199, 35 Stat. 312.

[3] Extended to April 26, 1956, by Act May 10, 1928, c. 517, 45 Stat. 495.

Bartlett an oil and gas lease of the land allotted to Barnett. The lease required that the royalties be paid to a local representative of the Secretary of the Interior and held for Barnett's benefit.

Royalties came in rapidly. In 1920 they had produced in the hands of the Secretary's local representative a fund of about $1,000,000, after various small sums had been turned over to the Oklahoma guardian for Barnett's support. Near that time the accumulated fund was taken over by the Secretary, invested in U. S. Liberty Bonds and held by him for Barnett's use.

News of Barnett's wealth became widespread and thereafter, as was found by the district court, he was kidnapped by an adventuress who took him to two States other than that of his residence and had him go through a marriage ceremony with her in both; was harassed and annoyed by her attorneys and their allies; and on December 15, 1922, was induced by them to put his thumb mark upon an instrument, not understood by him, requesting the Secretary of the Interior to distribute the greater part of the trust fund in the latter's custody by giving $550,000 in Liberty Bonds to the wife, and a like sum in such bonds to the American Baptist Home Mission Society on condition that it pay for his use $20,000 a year during the remainder of his life. Barnett was then about 73 years of age and the designated annuity was less than the yearly interest or the bonds to be given to that society.

On February 1, 1923, the Secretary of the Interior approved that instrument and soon after approving it he distributed the $1,100,000 in Liberty Bonds as requested.

After the distribution was effected the wife took Barnett to California and on her application a court of that State, in 1924, adjudged him an incompetent, incapable of caring for his person or estate, and appointed a guardian.

The Oklahoma guardian, on learning of the distribution, invoked the assistance of reputable attorneys with a view to asserting and protecting Barnett's interest in the bonds thus separated from his trust fund. These attorneys acquainted themselves with Barnett's mental incompetency and the other facts bearing on the validity of the distribution, brought the facts to the attention of the Secretary of the Interior and earnestly and repeatedly requested that officer to take steps to secure a restoration of the bonds to the trust

fund. The Secretary declined to take such action, insisted the distribution was valid and must stand and refused to permit any moneys under his control and belonging to Barnett to be used in an effort to recover the bonds. The attorneys then laid the matter before the Department of Justice and urged the institution of suits on the part of the United States for the revocation of the distribution and the return of the bonds, but this request like that to the Secretary of the Interior failed.

Thereafter, on January 22, 1925, the attorneys brought a suit in equity in the name of Barnett, by Elmer S. Bailey as next friend, against the American Baptist Home Mission Society and others to cancel the gift to that society and to protect and preserve Barnett's interest in the bonds so given and the income therefrom. Bailey, the next friend, was the Oklahoma guardian who had invoked the assistance of the attorneys. The suit was brought in the United States District Court for the Southern District of New York. Other suits relating to the other bonds were brought elsewhere, but they are without bearing here.

After the suit was begun the Secretary of the Interior continued to oppose the effort to annul the distribution—and this notwithstanding he was advised in a letter of February 9, 1925, from the then Attorney General, Mr. Stone, to whom he had stated his opposition two days before, that the distribution appeared to be entirely unauthorized and that the Government was in duty bound to use its best efforts to assist in recovering the bonds. Mr. Stone retired from the office of Attorney General soon after the date of that letter, and thus was unable to carry his view into effect.

On January 20, 1926, the succeeding Attorney General, at the solicitation of the next friend and his attorneys, sought and obtained leave for the United States to intervene in the suit and thereby participate in the effort to effect a recovery of the bonds and their income for Barnett's benefit. After the intervention was accomplished the attorneys for the next friend and the solicitors for the United States harmoniously prosecuted the cause to a successful conclusion. All rendered commendable service, but in many particulars the leading part and major burden fell to the attorneys for the next friend.

On the final hearing the court found that Barnett was illiterate and so stunted and undeveloped mentally that he was incapable of managing his own affairs or of understanding a transaction like

the one in question; that the wife and her attorneys and allies, with selfish motives, induced him to place his thumb mark on the instrument requesting the distribution; and that he did this without any real comprehension or knowledge of what he was doing. The court also ruled that the Secretary of the Interior could not by his approval give validity to a gift which the apparent donor by reason of mental incompetency was incapable of understanding or making; that the defendants, although blameless, acquired no property or beneficial interest through the purported gift and must be regarded as holding the bonds and the income therefrom as the property of Barnett; and that as the bonds were wrongly taken from the trust fund in the custody of the Secretary of the Interior they and the income from them (less such allowances as the court should require to be paid therefrom for services and disbursements connected with the recovery) should be restored to that fund and there held for Barnett agreeably to applicable laws of Congress.[3] A decree to that effect was entered and an attempted appeal by one of the defendants proved of no avail.[4]

The court later on, pursuant to a reservation in the decree, took up the question of what, if any, allowances should be made for services and disbursements. Applications for such allowances were made by the attorneys for the defendants, by the next friend and by his attorneys. All were opposed by the United States. The court rejected the application of the attorneys for the defendants and by a supplemental decree allowed to the next friend $7,500 for his services and allowed to his attorneys $184,881.08 for their services and $4,282.93 to reimburse them for out-of-pocket expenses. There were also directions that these allowances be paid out of the fund which had been the subject of the litigation and that the fund as thus reduced be restored to the custody of the Secretary of the Interior conformably to the prior decree. On an appeal by the United States the Circuit Court of Appeals reduced the allowance for the services of the attorneys for the next friend to $100,000 and sustained the other allowances.[5] This Court then granted a petition by the United States for a further review on a writ of certiorari.

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[3] 21 Fed. (2d) 325.
[4] 26 Fed. (2d) 350; 278 U. S. 626.
[5] 34 Fed. (2d) 916.

It is a general rule in courts of equity that a trust fund which has been recovered or preserved through their intervention may be charged with the costs and expenses, including reasonable attorney's fees, incurred in that behalf; and this rule is deemed specially applicable where the fund belongs to an infant or incompetent who is represented in the litigation by a next friend. "Such a rule of practice", it has been said, "is absolutely essential to the safety and security of a large number of persons who are entitled to the protection of the law—indeed, stand most in need of it—but who are incompetent to know when they are wronged, or to ask for protection or redress."[6]

Counsel for the United States concede the general rule, but regard it as inapplicable here. They assume that Barnett's fund was restricted in the sense that it was not subject to disposal in any form or for any purpose, save with the approval of the Secretary of the Interior; and from this they argue that the court by charging the fund with the costs and expenses and requiring their payment therefrom would be disposing of a part of the fund in violation of applicable restrictions.

We make the assumption that the restrictions had substantially the same application to the fund that they had to the land from which it was derived, but we think the argument carries them beyond their purpose and the fair import of their words. Without doubt they were intended to be comprehensive and to afford effective protection to the Indian allottees, but we find no ground for thinking they were intended to restrain courts of equity when dealing with situations like that disclosed in this litigation from applying the rules which experience has shown to be essential to the adequate protection of a wronged *cestui que trust* such as Barnett was shown to be.

The refusal of the Secretary of the Interior and the failure of the Department of Justice to take any steps to correct the wrong amply justified the institution, in 1925, of the suit in the name of Barnett by the next friend. The United States intervened only after the suit had proceeded for a full year. Its purpose in inter-

[6] 36 N. J. Eq. 456, 458; 1 Daniell's Chancery Pl. & Pr., 6th Am. Ed., *pp. 69, 79. And see Trustees v. Greenough, 105 U. S. 527, 532 *et seq.*; Central Railroad & Banking Co. v. Pettus, 113 U. S. 116, 123.

vening, as shown by the record, was not to supplant or exclude the next friend and his attorneys, but to aid in establishing and protecting Barnett's interest in the fund in question. In its petition of intervention it prayed that this fund "after deducting the reasonable expenses of this litigation" be restored to the custody of the Secretary of the Interior. Later on it acquiesced in an order allowing the next friend's attorneys $3,000 from the fund to meet expenses about to be incurred. In all the proceedings which followed the intervention it cooperated with the next friend to the single end that the diverted fund be recovered for Barnett's benefit. And both were satisfied with the main decree when it was rendered.

When all is considered, we are brought to the conclusion that the United States by its intervention and participation in the suit consented, impliedly at least, that reasonable allowances be made from the fund, under the rule before stated, for the services and expenses of the next friend and his attorneys.[1]

We come then to the question whether the allowances were excessive. Counsel for the United States now confine their criticism to the one for the attorneys' services.

The District Court apparently included some services in other litigation, particularly in Oklahoma. But the Circuit Court of Appeals excluded them, and we think its action was right. The nature of the other litigation was such that it could neither disturb the prosecution of this suit nor affect the outcome.

While the Circuit Court of Appeals reduced the allowance to $100,000, it stated that $50,000 would have been enough but for the hazard. We think the hazard was small and that the allowance should have been $50,000. The material facts were few and demonstrable; and the applicable legal principles were fairly certain. Of course, there was need for intelligent research and action; but otherwise there was not much hazard. While the record shows that these attorneys did their part well, it also shows that after the intervention of the United States the attorneys of the latter contributed much helpful service. The fund which was recovered was large, and of course this had a bearing on what was reasonable, but it gave no license to go further.

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[1] The Siren, 7 Wall. 152, 154; United States v. The Thekla, 266 U. S. 328, 339-340. And see New York Dock Co. v. S. S. Poman, 274 U. S. 117, 121.

The fund belonged to an Indian who was mentally incompetent. He had no voice in selecting the attorneys and could have none in fixing their fees. Thus justice to him required that special care be taken to confine the fees to what was reasonable. And by applying that standard justice would also be done to the attorneys.

As before indicated, we think the allowance of $100,000 unreasonably high and that to bring it within the standard of reasonableness it should be reduced to $50,000.

The supplemental decree is modified accordingly and as so modified is affirmed.

Decree modified and affirmed.

Mr. Justice STONE did not participate in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.